

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,476

NED BORD and ANNE R. BORD, *Petitioners*

v.

DISTRICT OF COLUMBIA, *Respondent*

On Petition for Review of the District of Columbia Tax Court

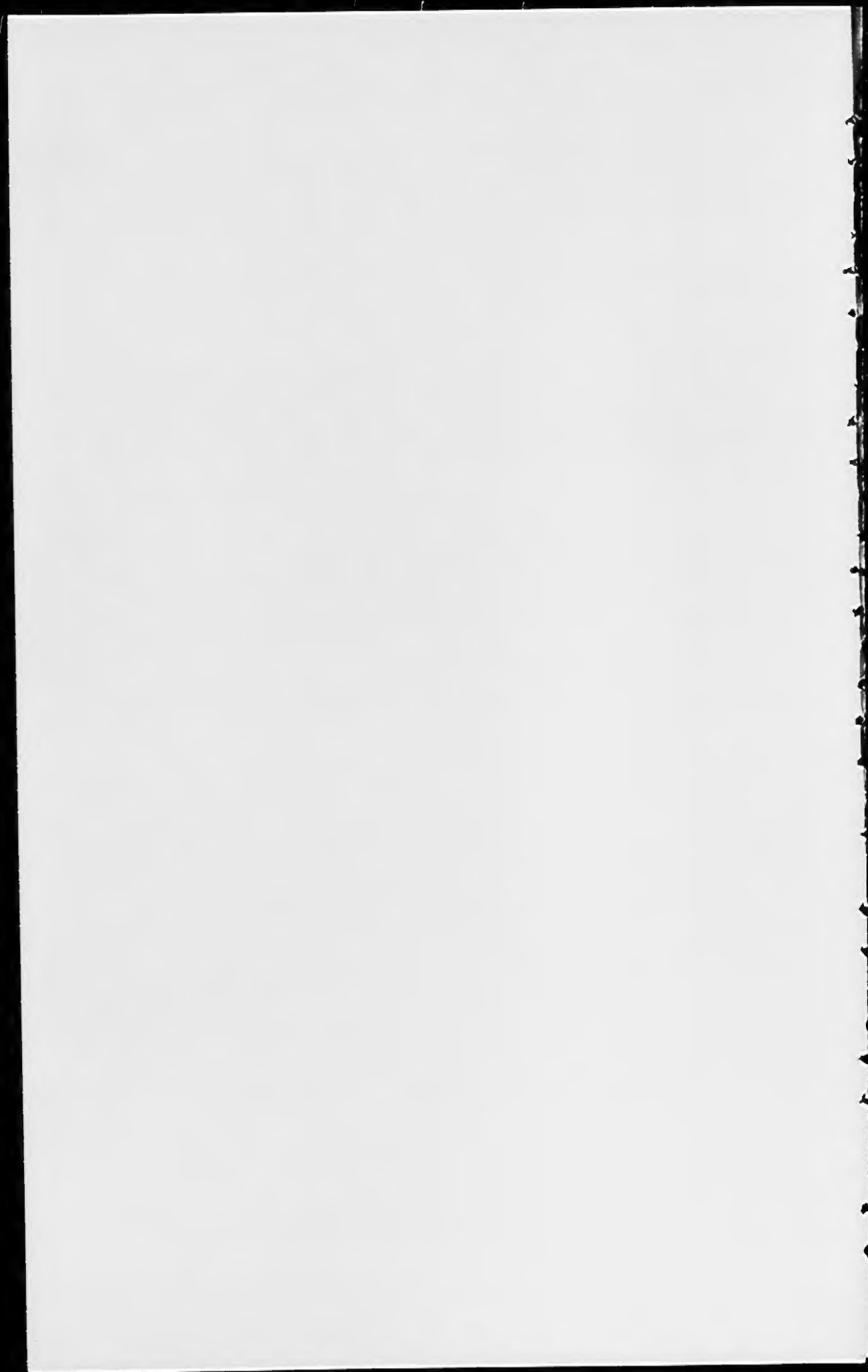
JOINT APPENDIX

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 18 1964

Nathan J. Paulson
CLERK





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JOINT APPENDIX

DISTRICT OF COLUMBIA TAX COURT

Docket No. 1863

NED BORD and ANNE R. BORD, Petitioners,

vs.

DISTRICT OF COLUMBIA, Respondent.

Counsel: Nathan Sinrod, Esq.; Werner Strupp, Esq.
Address: 1735 DeSales St., N.W., Washington 6, D. C.

Docket

Date; Proceedings; Memorandum.

1963

Feb. 18—Petition filed—Taxpayer notified—Corporation
Counsel and Finance Office served. Income Tax.

Apr. 2—Hearing set Apr. 24—Certificate of Service.

Apr. 16—Motion For Continuance—Certificate of Service.

Apr. 16—Motion For Consolidation—Certificate of Service.

Apr. 19—Objections To Motion For Consolidation—Certificate of Service.

Apr. 19—Memorandum—Order—Consolidate cases for
hearing May 8, 1963.

May 8—Hearing—Robert E. McCally, Esq. for District.

June 26—Notice of setting case for further hearing—Certificate of Service.

July 9—Second Hearing—Robert E. McCally, Esq. for District.

- July 31—Brief for Petitioners—Certificate of Service.
- Sept. 30—Motion For Extension Of Time Within Which To File Brief For Respondent—Certificate of Service.
- Oct. 1—Motion granted—Time extended to Oct. 10—Certificate of Service.
- Oct. 10—Brief for Respondent—Certificate of Service.
- Oct. 17—Reply Brief for Petitioners—Certificate of Service.
- Oct. 28—Stipulation.
- Nov. 15—Findings of Fact—Opinion—Decision—Certificate of Service.
- Nov. 27—Petitioners' Motion For Extension Of Time To File Motions Under Rules 12(e) And 12(f).
- Dec. 2—Granted—Certificate of Service.
- Dec. 13—Motion For Reconsideration, For Further Hearing And To Revise Findings Of Fact—Motion To Vacate Decision—Certificate of Service.

1964

- Jan. 8—Memorandum In Opposition To Motion Of Petitioners To Vacate Decision, For Reconsideration, For Further Hearing, And To Revise Finding Of Fact—Certificate of Service.
- Jan. 9—Motions Denied—Certificate of Service.
- Jan. 30—Petition For Review Of A Decision Of The District Of Columbia Tax Court—Certificate of Service.
- Feb. 11—Designation Of Record—Certificate of Service.

Petition

(Filed Feb. 13, 1963)

1. The above-named petitioners are husband and wife with residence at 4501 Connecticut Avenue, N. W., Washington, D. C.

2. The tax involved is income tax for the calendar year 1958 in the amount of \$12,423.62, consisting of the alleged deficiency in tax, penalty and interest thereon.

3. The notice of assessment was dated November 21, 1962, as will appear from the copy thereof attached as Exhibit 'A'. The tax was paid by the petitioner on February 14, 1963. Copies of the reports relating to the alleged deficiency are attached hereto as Exhibits B-1, B-2 and B-3.

4. The assessment is based upon the following errors:

(a) The assessment is barred by the provisions of Section 47-1586i(a)(1), D. C. Code (1961).

(b) It is erroneously alleged by the respondent that petitioner Anne R. Bord received a liquidating dividend from a corporation known as Sedgwick Gardens, Inc.

(c) The respondent has erroneously disallowed a deduction for a worthless business loan made to Sun Corporation and claimed by the petitioners on their 1958 income tax return.

(d) The respondent has erroneously asserted a 5% negligence penalty, alleged to be due in accordance with Section 47-1589(a), D. C. Code (1961).

5. The facts upon which the petitioners rely as the basis of this case are as follows:

(a) The petitioners had entered into a written agreement, dated March 15, 1962, whereby they extended the period of time during which an assessment of income taxes could be made respecting their 1958 income tax returns, to October 15, 1962 provided that if "a notice of a de-

iciency" was mailed to them before that date, the Finance Officer would have an additional period of sixty days to make such assessment. Although a notice of proposed deficiency was mailed to the petitioners on September 12, 1962, a final notice for a different amount from that originally proposed, was not rendered until November 21, 1962; this date was subsequent to the date of notice required under the agreement of March 15, 1962.

(b) Petitioner Anne R. Bord, in her individual capacity, on January 27, 1958, entered into a contract, for the sale of a twenty-five percent interest in certain real property, located in the District of Columbia, known as "Sedgwick Gardens Apartments". This petitioner, as well as others, were former stockholders of a corporation known as Sedgwick Gardens, Inc. The said property was distributed to the various stockholders, including this petitioner, in complete liquidation of Sedgwick Gardens, Inc. The individuals thereupon sold the property to an unrelated party.

(c) Petitioner Ned Bord made certain advances to Sun Corporation in the total sum of \$86,708.99. The said loans were made in the course of the petitioner's trade or business. As of December 31, 1958, Sun Corporation was insolvent. The petitioner did not receive repayment of any part of the said loan in subsequent years.

(d) The fact that petitioner Anne R. Bord did not report income from the disposition of her interest in Sedgwick Gardens Apartments, was not due to negligence, or intentional disregard of rules and regulations. The tax return in question was filed in accordance with the law as understood by the petitioner, based on professional advice received.

WHEREFORE, the petitioners pray that this Court may hear the case and

1. Enter its decision that the aforesaid deficiency was illegally assessed and is invalid.

2. Order the respondent to refund to the petitioners the sum of \$12,423.62, plus interest as provided by law.

Opinion No. 1020

DISTRICT OF COLUMBIA TAX COURT

(Filed Nov. 15, 1963)

Docket No. 1858

HARRY D. GOLDSTEIN and PHILIP GOLDSTEIN, Trustees U/W
of SAMUEL GOLDBERG, Deceased, Petitioners,

vs.

DISTRICT OF COLUMBIA, Respondent.

Docket No. 1863

NED BORD and ANNE R. BORD, Petitioners,

vs.

DISTRICT OF COLUMBIA, Respondent.

Docket No. 1866

VICTOR BLOCK, Petitioner,

vs.

DISTRICT OF COLUMBIA, Respondent.

Findings of Fact and Opinion

The above entitled causes have been consolidated for hearing and disposition. The petitioners in the three cases were stockholders of Sedgwick Gardens, Inc., a corporation. The corporation was dissolved and its assets were distributed to its stockholders. The assessing authority of the District of Columbia determined that the amounts received by the stockholders in the dissolution were dividends within the meaning of Section 47-1551c(m) of the District of Columbia Code (Section 4(m) of Title I of the District of Columbia Income and Franchise Tax Act of 1947), and assessed income taxes accordingly. The petitioners here appeal from that assessment. There are other and differing issues raised respectively in the petitions, which are secondary to the main issue above stated.

*Findings of Fact***I***In General*

1.(a) Sedgwick Gardens, Inc. was a Maryland corporation. It was organized several years prior to January 10, 1958.

(b) On January 10, 1958, the entire paid-in capital stock of Sedgwick Gardens, Inc. was \$72,000.

(c) On January 10, 1958, the capital stock of Sedgwick Gardens, Inc. was held equally by the stockholders following: Lily Friedland, a non-resident of the District of Columbia, and the following residents of the District of Columbia:

Anne R. Bord

Ellis P. Block, Trustee under an indenture of trust dated December 23, 1941

Harry D. Goldstein and Philip Goldstein, Trustees under the will of Samuel Goldberg, deceased.

(d) The officers of the corporation were the following: President, Louis Friedland, the husband of Lily Friedland; Vice-President, Ned Bord, the husband of Anne R. Bord; Treasurer, Bernard Easterson; Secretary, Victor I. Block, son of Ellis P. Block.

2. On January 10, 1958, Sedgwick Gardens, Inc. was the owner of an apartment house, known as "Sedgwick Gardens", being premises numbered 3726 Connecticut Avenue, Washington, D. C., and more particularly described as:

Lot 31 in Square 2060, in the subdivision made by The Chevy Chase Land Company of Montgomery County, Maryland, as per plat recorded in Liber 93, folio 121 of the Records of the Office of the Surveyor of the District of Columbia, described by metes and

bounds in accordance with a survey recorded in Survey Book 106, page 130 of the said Surveyor's Office records.

3.(a) The affairs of Sedgwick Gardens, Inc. and the management of the apartment house owned by it and known as "Sedgwick Gardens" were carried on generally by the Randall H. Hagner & Company, a corporation engaged in the real estate business and particularly by Ned Bord, an employee of that corporation and the husband of the stockholder Anne R. Bord.

(b) The corporation did not have an account in any bank, its banking services being carried on by Randall H. Hagner & Company, which carried an account with the corporation showing, as credits in the latter's favor, the rents collected from the apartment house, and, as debits, the payments by the Hagner Company of expenses in the operation of the apartment house, income and other taxes and corporate dividends.

(c) Most of the corporate documents of Sedgwick Gardens, Inc., including all income tax returns, were signed by Ned Bord as its Vice-President. The office of Randall H. Hagner & Company was given as the business address of the corporation.

4. For some time prior to January 10, 1958, Ned Bord and Legum & Gerber Realty Company, a real estate firm, carried on negotiations for the sale of the apartment house, Sedgwick Gardens, to Darwin Corporation or to its assignee or designee. On or about January 10, 1958, or a short time prior thereto, an informal agreement was made by the negotiating parties for the sale of the apartment house property for \$1,085,000. Legum & Gerber Realty Company, acting for the owner of that property, signed a receipt dated January 17, 1958, to the effect that it had received the sum of \$50,000 as a deposit on the purchase of the property for \$1,085,000, with the terms and conditions of sale therein contained. The contract of purchase rep-

resented by the receipt was accepted by Darwin Corporation on January 17, 1958. Ten days later, that is to say on January 27, 1958, there was executed on the reverse side of the receipt the instrument following:

"We, the undersigned, being liquidating stockholders of Sedgwick Gardens, Inc., do hereby accept the written contract for the sale of Lot 31 in Square 2060, in the District of Columbia, subject, however, to the following changes, namely:

1. That the price to be paid for said property shall be One Million One Hundred Thousand Dollars (\$1,100,000.00) all cash, of which the deposit is to be a part. Said price is to be NET to Sellers, free of brokerage commissions.

2. That if the deposit is forfeited no commission or compensation is to be paid to the brokers, notwithstanding any other provision to the contrary appearing on the reverse side hereof.

Dated: January 27, 1958

Harry D. Goldstein Trustees of Samuel
Philip Goldstein Goldberg, deceased
Lily Friedland
Ellis P. Block Trust
by Ellis P. Block, Sole Trustee
Anne B. Bord

SELLERS

The foregoing changes are hereby accepted this 27th day of January, 1958.

The foregoing provisions are approved:

DARWIN CORPORATION
by Dunbar A. Rosenthal
PRESIDENT PURCHASER

LEGUM & GERBER REALTY Co.
By David H. Legum
Raymond J. Gerber"

5. There was an agreement or understanding between Sedgwick Gardens, Inc. and Legum & Gerber Realty Company that the latter would be paid the sum of \$10,000 for its services in procuring a purchaser for the property. Such compensation was paid by Randall H. Hagner & Company out of the funds in the aforesaid account it maintained with Sedgwick Gardens, and was charged against that corporation.

6.(a) On February 28, 1958, settlement of the transfer of the apartment house property from Sedgwick Gardens, Inc. "acting herein pursuant to Resolutions of its Stockholders and Board of Directors", to 3726 Connecticut Avenue, Inc., a corporation and the assignee or designee of Darwin Corporation, was had at the joint office of The Real Estate Title Insurance Company and the Columbia Title Insurance Company, hereinafter called "the Title Company" in Washington, D. C. There was delivered to the Title Company for recordation a deed from Sedgwick Gardens, Inc. to 3726 Connecticut Avenue, Inc., transferring the apartment house property. None of the stockholders signed the deed or any other instrument of transfer.

(b) At the settlement there was delivered to the Title Company the document following:

"Columbia Title Insurance Company
Woodward Building
15th and H Sts., N. W.
Washington, D. C.

Gentlemen:

Reference is made to the settlement being held this day in your office involving the sale of Lot Thirty-one (31) in Square 2060 with improvements thereon known as Sedgwick Garden Apartments, Washington, D. C.

You are hereby instructed to disburse the proceeds of the sale to the following-named persons who are

liquidating stockholders of Sedgwick Gardens, Inc., in the proportion set beside their names:

Lily Friedland $\frac{1}{4}$

Anne R. Bord $\frac{1}{4}$

Ellis P. Block, Trustee of
Ellis P. Block Trust $\frac{1}{4}$

Harry D. Goldstein and Philip Goldstein,
as Trustees under the will of
Samuel Goldberg, deceased..... $\frac{1}{4}$

We hereby certify to you that Sedgwick Gardens, Inc. has no obligations other than the first deed of trust, if any, against the above property and further, except for current operating expenses of said property, funds for the payment of which are currently in the hands of Randall H. Hagner & Company, with instructions to use said funds for the payment of said current operating expenses.

Very truly your,

SEDGWICK GARDENS, INC.

By Ned Bord

Vice-President."

(c) In the settlement of the above mentioned transfer Sedgwick Gardens, Inc. was the sole grantor and was considered so by the Title Company. Its statement of account of the settlement delivered to, and accepted by the corporation and its stockholders without objection was the following:

"Settlement Case No. 89177 To Sedgwick Gardens,
Inc., Dr.
In Re Sale — Lot 31 — Square 2060 — Date February
28, 1958

Price of Property		\$1,100,000.00
Insurance Fire, Theft, E.C. on garage pd. to 4-8-58 \$25,000.00		7.67
Insurance Lia. pd to 4-8-58		7.64
Taxes pd to 12-31-57 at \$13,366.08	\$ 2,227.68	
Deed of Trust	277,500.00	
Interest fr 9-4-57 (acc. \$3638.33)	5,550.00	
Release	12.50	
Trustee Fee	10.00	
Service Charges	10.00	
Revenue Stamps	1,210.00	
Balance to:		
Lily Friedland (1/4)	203,373.78	
Balance to:		
Anne R. Bord (1/4)	203,373.78	
Balance to: Ellis P. Block, Trustee of Ellis B. Block Trust (1/4)	203,373.78	
Balance to: Harry D. Gold- stein and Philip Goldstein Trustees under the Will of Samuel Goldberg, deceased (1/4)	203,373.78	
	<hr/>	<hr/>
	\$1,100,015.31	\$1,100,015.31"
	<hr/>	<hr/>

(d) Each of the stockholders received the amount of \$203,373.78 in cash from the Title Company.

7.(a) Randall H. Hagner & Company, as the rental agent for, and manager of Sedgwick Garden apartments sent or

delivered to Sedgwick Gardens, Inc. a rental statement for the period from January 1, to February 28, 1958, reporting to the latter corporation, as the owner of the property during that period, the rents collected from the tenants thereof and the expenses incurred by the former on behalf of the latter corporation in the operation of the property. No such statement was sent to any of the stockholders of Sedgwick Gardens, Inc.

(b) Sedgwick Gardens, Inc. in income tax returns for the period from January 1, to February 28, 1958, (the date of the sale of the property) filed with¹ the assessing authority of the District and with the Internal Revenue Service, reported, as gross income, the net rents accruing from the apartment house property, and collected from Randall H. Hagner & Company. The return was signed by Ned Bord, as Vice-President of Sedgwick Gardens, Inc. Attached to the income tax return were a balance sheet and a profit and loss statement, called "STATEMENT OF OPERATIONS", copies of which are appended to these findings of fact as APPENDICES "A" and "B".

(c) Ned Bord, as Vice-President, and Victor Block, as Secretary, were employed and were paid a salary by Sedgwick Gardens, Inc. during the period ending February 28, 1958.

(d) None of the stockholders residing in the District of Columbia reported the receipt of the rents from the apartment house property as gross income accruing to them in income tax returns filed with the Internal Revenue Service and with the assessing authority of the District.

8. Sedgwick Gardens, Inc. was dissolved on March 4, 1958, in accordance with Articles of Dissolution filed that day with the State Tax Commission of Maryland.

¹ Inadvertently, or because income tax forms for 1958 were not obtainable, a 1957 form was used, but the period covered therein was clearly stated to be Jan. 1, 1958 and ended Feb. 28, 1958.

9. The book deficit of \$5,602.04 resulting from a write-off of unexplained "Contract Rights" of \$24,000, appearing in the profit and loss statement attached to above mentioned income tax return (See Appendix "B"), and the probable payment of that sum to some person, was partially made up by a contribution of \$1,000 from each stockholder. Such contribution was partially returned by a final distribution of \$2,467.38, equally divided between the four stockholders, or \$616.84 to each stockholder.

Taxpayers

*Harry D. Goldstein and Philip Goldstein
Trustees under the Will of Samuel Goldberg*

Docket No. 1858

10. The petitioners are residents of the District of Columbia, and are Trustees under the will of Samuel Goldberg, deceased. They are here in that capacity.

11. On January 10, 1958, and for some time prior thereto the trust, of which the petitioners were trustees, was the owner of one-fourth of the capital stock issued by Sedgwick Gardens, Inc. The paid-in surplus or capital in respect of that portion of the capital stock was \$18,000.

12. The petitioners' decedent, Samuel Goldberg, died on May 15, 1960. His stock in Sedgwick Gardens, Inc. which was transferred by his will to the petitioners as trustees, was valued for Federal estate tax purposes at \$129,942.44.

13. The petitioners received upon the liquidation of Sedgwick Gardens, Inc. the sum of \$207,730.88 in cash.

14.(a) The petitioners filed with the assessing authority of the District a fiduciary income tax return for the year 1958, showing net income of \$10,716.85. The return reported that the sum of \$10,716.85 was distributed to Fannie Goldberg, the beneficiary of the trust, resulting in no income tax due by the petitioning trustees. In comput-

ing net income the petitioners did not include the amount of \$207,730.88, which they had therefore received from the Title Company, as one-fourth of the net proceeds of the sale of the apartment house property of Sedgwick Gardens, Inc.

(b) The petitioners in their income tax return reported as *Non Taxable Income* \$73,047.95 as "Long term capital gain held in excess of five years" in relation to Sedgwick Gardens, Inc. They omitted from gross income an amount in excess of 25 per centum of gross income stated on the return.

(c) On October 15, 1962, the assessing authority of the District assessed the petitioners a deficiency in income tax in the amount of \$9,106.54, plus interest in the amount of \$2,068.55, or a total of \$11,175.09, which the petitioners paid on November 15, 1962. The deficiency was computed as follows:

Total amount received in liquidation of Sedgwick Gardens, Inc.	\$207,730.88	
Less paid in surplus or capital	18,000.00	\$189,730.88
Exemption (Trust)		100.00
Taxable Income		\$189,630.88
Revised tax liability	\$ 9,106.54	
Less tax shown on return or previously adjusted	—0—	
Deficiency in tax	\$ 9,106.54	

(d) There is no dispute as to the computation of interest if the deficiency was correctly computed.

(e) This case was filed on January 11, 1963.

*Taxpayers**Ned Bord and Anne R. Bord*

Docket No. 1863

Some of the facts relating to the petitioners have been stipulated by the parties, and as stipulated are found by the Court. The Court makes additional findings of fact as follows:

15. The petitioners are husband and wife. Ned Bord is a petitioning taxpayer because he and his wife, Anne R. Bord, filed with the assessing authority of the District a joint return. The deficiency in income tax was assessed against him jointly with his wife. They are residents of the District of Columbia.

16. The petitioner Anne R. Bord, as a stockholder of Sedgwick Gardens, Inc., received \$207,730.88 in cash upon the dissolution of that corporation.

17. (a) In their joint income tax return for the year 1958, the petitioners did not report the receipt by the petitioner Anne R. Bord, of the sum of \$207,730.88, less \$18,000, or the net sum of \$189,730.88, in cash upon the dissolution of Sedgwick Gardens, Inc. In addition, there was claimed as a deduction in computing Ned Bord's business income the item following: "Worthless Business Loan—Sun Corp.—\$86,708.99". Such omission and deduction resulted in a showing on the tax return that no income tax was due by the Petitioners for the year, 1958.

(b) The petitioners in their income tax return omitted from gross income an amount properly includible therein which was in excess of 25 per centum of the amount of gross income stated in the return.

18. (a) On March 15, 1962, the petitioners Ned and Anne R. Bord entered into an agreement with the Finance Officer of the District in relation to the income tax liability of the former for the year 1958 whereby any income tax

due by them "may be assessed at any time on or before October 15, 1962, except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered or certified mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Finance Officer, D. C., is prohibited from making an assessment and for sixty days thereafter".

(b) On September 12, 1962, there was sent by certified mail to Ned and Anne R. Bord by the Finance Officer a notice of deficiency in which the income tax was computed to be \$10,305.86, plus a negligence penalty of \$490.76. On November 21, 1962, there was mailed to Ned and Anne R. Bord the following:

"Ned and Anne R. Bord
4501 Connecticut Avenue, N.W., #616
Washington 8, D. C.

Re: 1609558(58)(ERG)

Our proposed deficiency in income tax against you for the taxable year 1958 has been recomputed as follows:

Taxable income per our notice of 9/12/62	\$203,801.97
Less: Contributions not claimed on return, allowed	3,816.69
Taxable income, as corrected	\$199,985.28
Revised tax liability	\$ 9,623.26
Add: 5% negligence penalty	481.16
Revised deficiency and penalty	\$ 10,104.42

This adjustment in your taxable income is the result of information submitted in a letter dated October 10, 1962, from your accountant, Mr. Oliver Higgs.

A bill for the revised deficiency in tax, penalty and statutory interest is enclosed for prompt payment."

(c) The assessing authority of the District determined that the petitioners had received unreported taxable income computed as follows:

“Liquidating dividend received from
Sedgwick Gardens, Inc., computed
as follows:

Total amount received at liquidation	\$207,730.88
Less: Par Value of stock	18,000.00
Liquidating dividend	\$189,730.88”

(d) The assessing authority of the District assessed the petitioners a penalty of 5 per centum of the aforesaid dividend, for failure to report its receipt.

(e) The assessing authority of the District disallowed the deduction for bad debt in the amount of \$86,708.99.

(f) The assessing authority on November 21, 1962, assessed the petitioners a deficiency in income tax in the amount of \$9,623.26, plus a negligence penalty of \$481.16, plus interest in the amount of \$2,319.20 or a total of \$12,423.62.

(g) On February 14, 1963, the petitioners paid the above mentioned deficiency, penalty and interest.

19. This case was filed on February 18, 1963.

Taxpayer

Victor Block

Docket No. 1866

20. The petitioning taxpayer is a resident of the District of Columbia. He was the Secretary of Sedgwick Gardens, Inc.

21. On January 10, 1958, the petitioner was, and at all times since that date has been a beneficiary under a trust, known as “Ellis P. Block Trust”, and created by Ellis P. Block by a trust agreement, dated December 23, 1941.

22(a) Ellis P. Block Trust received \$207,730.88 in cash upon the dissolution or liquidation of Sedgwick Gardens, Inc. in 1958, and the trustee thereof, Ellis P. Block, distributed one-third of the amount received, to the petitioner, as a beneficiary under the trust agreement.

(b) Ellis P. Block, as the trustee for the Ellis P. Block Trust, filed with the assessing authority of the District a fiduciary income tax return for the year, 1958. In that return the petitioner reported the receipt of \$207,730.88 as non-taxable income, that is to say, as gain from the disposition of the capital asset, in the manner following:

**"SCHEDULE A-1—GAINS AND LOSSES FROM
SALES OR EXCHANGE OF CAPITAL ASSETS**

Description of Property	Date		Gross Sales Price	Cost or Other Basis	Gains or Loss
	Date Acquired	Sold or Exchanged			
Sedgwick Gardens	1941	2/58	\$207,730.88	\$18,000	\$189,730.88
Total Net Gain or Loss omitted (Under authority of Title III, Sec. 2(b)(11) and Sec. 3(b)(6) of D. C. Income and Franchise Tax Act of 1947, as amended) in the computation of net income.....					\$189,703.88
State how property was acquired.....					"

(c) The amount of gross income reported by the fiduciary, Ellis P. Block, in the above mentioned return was \$3,623.77, and the deduction claimed was \$1,928.85, leaving net income reported as \$1,694.92, which was reported distributed as follows: \$797.46 to the petitioner, Victor Block, and \$797.46 to Marilyn B. Meyers.

(d) The petitioner, Victor Block, filed with the assessing authority of the District of Columbia an income tax return for the year 1958. In that return he reported as the amount of taxable income received from the Ellis P. Block Trust the amount of \$797.46 only.

(e) The petitioner in his income tax return omitted from gross income an amount properly includible therein which was in excess of 25 per centum of the amount of gross income stated in the return.

23(a). On March 15, 1962, the Finance Officer sent by certified mail a notice of deficiency in income tax in the amount of \$4,575.56. To the notice was an auditor's report computing the deficiency.

(b) On March 28, 1962, the petitioner and the Finance Officer of the District entered into an agreement, whereby it was agreed "That the amount of any income taxes due by Victor Block, may be assessed at any time on or before October 15, 1962, except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered or certified mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Finance Officer, D. C., is prohibited from making an assessment and for sixty days thereafter".

(c) On October 12, 1962, Sinrod and Tash, certified public accountants, who apparently represented Victor Block in respect of District of Columbia taxation, by one Leon Meyrowitz, wrote the Finance Office of the District of Columbia the letter following:

"Pursuant to your letter of March 15, 1962 extended by agreement to October 15, 1962, this is to advise you that the above-named taxpayer is NOT in agreement with your proposed adjustment for the following reason:

"You propose an addition to income in the amount of \$94,865.44, on the basis of this amount being unreported income received from the Ellis P. Block Trust. Under the District of Columbia Income Tax Act, beneficiaries of a trust are taxed on any amounts deducted by fiduciaries in computing the net income of

the trust. Inasmuch as the Ellis P. Block Trust did not claim a deduction for the amount distributed to this taxpayer in arriving at its net income, the \$94,865.44 does not constitute taxable income to Mr. Victor Block.

"We respectfully request an opportunity for a hearing in your office prior to a final determination in this matter."

(d) On October 23, 1962, the Finance Office mailed to Sinrod and Tash the letter following:

"In response to your letter of October 12, 1962, we have tentatively set November 14, 1962, at 10 A.M. as a time for a hearing in this office.

"If you are unable to appear on the date specified, please contact this office in order that an appointment convenient to you may be arranged."

(e) On December 12, 1962, there was mailed to the petitioner the letter following:

"December 12, 1962

"Mr. Victor Block
4545 Connecticut Avenue, N.W.
Washington, D. C.

Re: 1613692(ERG)

"Dear Mr. Block:

Your tax liability for 1958 has been corrected as follows:

Taxable income per return		\$ 9,160.23
Additional income per letter of proposal of March 15, 1962	\$94,865.44	
Less: Share of above amount attributable to income of Mil- lie Block	31,621.82	63,243.62

Corrected taxable income		\$72,403.85
Tax on corrected taxable income		\$ 3,245.19
Less: Tax paid per return		249.81
Deficiency in tax		\$ 2,995.38
Tax on corrected taxable income		\$ 3,245.19
Less: Income tax withheld	\$ 50.72	
Payment on declaration of estimated tax	200.00	250.72
Balance of Tax due		\$ 2,994.47

The above is in accordance with distributions as contained in the 1958 Federal Fiduciary Income Tax return of Ellis P. Block Trust as furnished by your accountant, Mr. Meyrowitz."

24(a). The assessing authority of the District determined that the Ellis P. Block Trust received as a dividend in the liquidation of Sedgwick Gardens, Inc., in the net amount of \$189,730.88, as computed in Finding 22(b) hereof; and that Victor Block, as a beneficiary of the trust received as a distribution one-third of that amount or \$63,243.63.

(b) On December 12, 1962, the assessing authority of the District assessed the petitioner a deficiency in income tax for the year 1958 in the amount of \$2,994.47, plus interest in the amount of \$673.75, or a total of \$3,668.22.

(c) On January 9, 1963, the petitioner paid the deficiency and interest.

25. This case was filed on February 27, 1963.

Opinion

These cases involve the question of the income tax liability of a group of former stockholders of Sedgwick Gardens, Inc., a corporation and the owner of an apartment house property in the District of Columbia, known as "Sedgwick Gardens". The corporation was dissolved. Its

assets were distributed to the stockholders. The primary question which must here be answered is whether the distributed assets, in excess of the paid-in surplus or invested capital, was earned surplus or unrealized appreciation of property. The question, as stated, is prompted by two decisions of the United States Court of Appeals for the District of Columbia Circuit, namely, *Berliner v. District of Columbia*, 103 U.S. App. D.C. 351, 258 F.2d 651, 86 W.L.R. 456, and *District of Columbia v. Oppenheimer*, 112 U.S. App. D.C. 239, 301 F.2d 563, 90 W.L.R. 559, both of which arose in this Court, and which relate to and interpret Section 47-1551c(m) of the District of Columbia Code, 1961 Edition,² which is in the language following:

“The word ‘dividend’ means any distribution made by a corporation (domestic or foreign) to its stockholders or members, out of its earnings, profits, or surplus (other than paid-in surplus), whenever earned by the corporation and whether made in cash or any other property (other than stock of the same class in the corporation if the recipient of such stock dividend has neither received nor exercised an option to receive such dividend in cash or in property other than stock instead of stock) and whether distributed prior to, during, upon, or after liquidation or dissolution of the corporation: *Provided, however,* That in the case of any dividend which is distributed other than in cash or stock in the same class in the corporation and not exempted from tax under this article, the basis of the tax to the recipient thereof shall be the market value of such property at the time of such distribution: And provided, however, That the word ‘dividend’ shall not include any dividend paid by a mutual life insurance company to its shareholders”

² Section 4(m) of Title I of the District of Columbia Income and Franchise Tax Act of 1947.

There are other questions presented in the three cases. They will be considered and resolved separately.

I

Statute of Limitations

The petitioners, Ned and Anne R. Bord (Docket No. 1863) and Victor Block (Docket No. 1868) claim that the deficiencies in income were invalid, because they were assessed after the expiration of time they legally could be made. They rely upon Section 47-1586i(a)(1) of the District of Columbia Code, 1961 Edition, which provides as follows:

“The amount of income taxes imposed by this subchapter shall be assessed within three years after the return is filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of that of such period.”

The respondent concedes that the deficiencies were not assessed within the statutory period of three years after the returns were filed, but it claims that the assessments were made in time; and that Section 47-1586i(c) of the District of Columbia Code applies. That section reads as follows:

“Where before the expiration of the time prescribed in subsection (a) for the assessment of the tax, both the Assessor³ and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at anytime prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.”

The respondent did not file a plea and set up exception to the running of the period of limitations described in

³ The Finance Officer is now the assessing authority of the District.

Section 47-1586i(c) and under ordinary circumstances such omission would be fatal. In these cases, however, the petitioners Ned and Anne R. Bord alleged and proved the facts relating to the exception claimed by the respondent. The Court, therefore, can consider the question of the exception.

Ned and Anne R. Bord, Docket No. 1863. On March 15, 1962, the petitioners entered into an agreement with the Finance Officer of the District in relation to the income tax liability of the former for the year 1958 whereby any income tax due by them "may be assessed at any time on or before October 15, 1962, except that, if a notice of a deficiency⁴ in tax is sent to said taxpayer (or taxpayers) by registered or certified mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond said date by the number of days during which the Finance Officer, D. C., is prohibited from making an assessment and for sixty days thereafter."

On September 12, 1962, there was sent by certified mail to the petitioners by the Finance Office a notice of deficiency as provided in Section 47-1586d of the District of Columbia Code, to which was attached an auditor's report, wherein the deficiency in income tax was computed to be \$10,305.86, plus a negligence penalty of \$490.76. On November 21, 1962, there was mailed to Ned and Anne R. Bord the following:

⁴ The notice of deficiency required by Section 47-1586 of the District of Columbia Code is not to be confused with that defined and referred to in Section 6212 of the Internal Revenue Code. They are not the same.

"Ned and Anne R. Bord
4501 Connecticut Avenue, N.W., #616
Washington 8, D. C.

Re: 1609558(58) (ERG)

Our proposed deficiency in income tax against you for the taxable year 1958 has been recomputed as follows:
Taxable income per our notice of 9/12/62 \$203,801.97
Less: Contributions not claimed on return,

allowed	3,816.69
Taxable income, as corrected	\$199,985.28
Revised tax liability	\$ 9,623.26
Add: 5% negligence penalty	481.16
Revised deficiency and penalty	\$10,104.42

This adjustment in your taxable income is the result of information⁵ submitted in a letter dated October 10, 1962, from your accountant, Mr. Oliver Higgs.

A bill for the revised deficiency in tax, penalty and statutory interest is enclosed for prompt payment."

A deficiency notice was mailed before October 15, 1962, and the deficiency was assessed on November 21, 1962. Both steps were well within the agreed periods. The Court is of the opinion that the deficiency was validly assessed. The fact that the assessing authority, when it learned that the taxpayers had failed in their return to deduct allowable contributions, not only had the right, but it was its duty to correct the computation.

The petitioners say that the paper sent to the petitioners by certified mail on September 12, 1962, was not a notice of deficiency, apparently because it did not conform to the kind of notice of deficiency referred to in Section 6212 of the Internal Revenue Code. The District of Columbia Code, however, in respect of notices of deficiency is different from the Federal law. The notice of deficiency sent to

⁵ Information concerning contributions not claimed on return.

the petitioners was that contemplated in Section 47-1586d of the Code.

For the reasons stated the Court is of the opinion that the assessments against Ned and Anne R. Bord were made within the time prescribed by the statute.

Victor Block, Docket No. 1868. The case of the petitioner, Victor Block is different from that of Ned and Anne R. Bord, in so far as they relate to issue involving the expiration of the period in which an assessment can be made legally. In the opinion of the Court, the pertinent facts in the two cases are essentially different. Those in this case are the following:

On March 15, 1962, the assessing authority of the District of Columbia mailed to the petitioner a notice of deficiency in the language following:

"Mr. Victor Block
4545 Connecticut Ave., N.W.
Washington, D. C.

RE: #1613692 (ERG)

Dear Sir:

The examination by this office of your Individual Income Tax return(s) for the year(s) ended December 31, 1958, indicates that the adjustment of your tax liability, as shown in the accompanying Report(s) of the D. C. Individual Income Tax Audit Changes, is warranted.

IF YOU AGREE to the adjustment(s), as shown on the report(s), the enclosed form of waiver should be executed and forwarded to this office promptly. Action will then be taken as indicated on line 13 or 14 of the report(s), whichever is applicable.

IF YOU DO NOT AGREE to the adjustment(s), you may file a protest with this office, within thirty (30) days from the date of this letter, stating the

grounds for your exceptions. Careful consideration will be given to such protest and, if you so request, an opportunity for a hearing in this office will be granted to you prior to final determination.

Should you fail to file either the enclosed waiver form or a written protest with this office within the thirty (30) day period, final determination of your tax liability will be made in accordance with the enclosed report(s)."

Attached to the letter or notice of March 15, 1962, was an auditor's report computing a deficiency in income tax due by the petitioner as follows:

Taxable income shown on return.....	\$ 9,160.23
Unreported income received from the Ellis P. Block Trust.....	94,865.44
Revised taxable income.....	\$104,025.67
Revised tax liability.....	\$ 4,821.38
LESS: Tax shown on return.....	249.81
Deficiency in tax.....	\$ 4,576.47
LESS: Tax withheld.....	\$ 50.72
Payment on estimated tax 200.00	250.72
Balance due.....	\$ 4,575.56 *

On March 28, 1962,⁷ the petitioner and the Finance Officer of the District entered into an agreement, whereby it was agreed "That the amount of any income taxes due by Victor Block, may be assessed at any time on or before October 15, 1962, except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered or certified mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which

* Should have been \$4,325.75.

⁷ The agreement was signed by Victor Block on March 22, 1962. It was not signed by the Finance Officer until March 28, 1962.

the Finance Officer, D. C., is prohibited from making an assessment and for sixty days thereafter”.

On October 12, 1962, Sinrod and Tash, certified public accountants, who apparently represented Victor Block in respect of District of Columbia taxation, by one Leon Meyrowitz, wrote the Finance Office of the District of Columbia the letter following:

“Pursuant to your letter of March 15, 1962 extended by agreement to October 15, 1962, this is to advise you that the above-named taxpayer is NOT in agreement with your proposed adjustment for the following reason:

“You propose an addition to income in the amount of \$94,865.44, on the basis of this amount being unreported income received from the Ellis P. Block Trust. Under the District of Columbia Income Tax Act, beneficiaries of the trust are taxed on any amounts deducted by fiduciaries in computing the net income of the trust. Inasmuch as the Ellis P. Block Trust did not claim a deduction for the amount distributed to this taxpayer in arriving at its net income, the \$94,865.44 does not constitute taxable income to Mr. Victor Block.

“We respectfully request an opportunity for a hearing in your office prior to a final determination in this matter.”

On October 23, 1962, the Finance Office mailed to Sinrod and Tash the letter following:

“In response to your letter of October 12, 1962, we have tentatively set November 14, 1962, at 10 A.M. as a time for a hearing in this office.

“If you are unable to appear on the date specified, please contact this office in order that an appointment convenient to you may be arranged.”

On December 12, 1962, there was mailed to the petitioner the letter following:

"December 12, 1962

"Mr. Victor Block
4545 Connecticut Avenue, N.W.
Washington, D. C.

Re: 1613692(ERG)

"Dear Mr. Block:

Your tax liability for 1958 has been corrected as follows:

Taxable income per return		\$ 9,160.23
Additional income per letter of proposal of March 15, 1962	\$94,865.44	
Less: Share of above amount attributable to income of Millie Block	31,621.82	63,243.62
Corrected taxable income		\$72,403.85
Tax on corrected taxable income		\$ 3,245.19
Less: Tax paid per return		249.81
Deficiency in tax		\$ 2,995.38
Tax on corrected taxable income		\$ 3,245.19
Less: Income tax withheld	\$50.72	
Payment on declaration of estimated tax	200.00	250.72
Balance of Tax due		\$ 2,994.47

The above is in accordance with distributions as contained in the 1958 Federal Fiduciary Income Tax return of Ellis P. Block Trust as furnished by your accountant, Mr. Meyrowitz."

In considering the assessment of the deficiency against the petitioner, Victor Block, we are met with the fact that between March 28, 1962, the date of the agreement extending the time for assessment, and December 12, 1962, the date of the assessment of the deficiency, no notice of de-

ficiency was mailed or sent by the assessing authority to the petitioner. There was, as appears above, a letter from petitioner's attorney disclaiming liability, and dated October 12, 1962, a reply from the Finance Office, dated October 23, 1962, setting a date for a hearing, and a letter from the Finance Office dated December 12, 1962, relating to "Your tax liability" and to a correction thereof. Even if the letters of October 23, and December 12, 1962, could be said to be notices of deficiency, which of course, cannot be said, they were too late, since they were not sent "on or before October 15, 1962". True, there was sent to the petitioner by certified mail a notice of deficiency on March 15, 1962, but at that time there was no agreement, so that there was no relation between the subsequent agreement and notice. From the language of the agreement the taxpayer had a right to assume that the notice of deficiency, to which reference is made in the agreement, was to be sent sometime between the effective date of the agreement and October 15, 1962; and that the assessing authority had abandoned or, in effect, withdrawn the notice of March 15, 1962. The parties could not have had the notice of March 15, in mind, otherwise the agreement would have been a silly and meaningless instrument.

The Court does not believe that the facts justify the application of Section 47-1586i(4)c, quoted in that part of this section of the opinion relating to the petitioners, Ned and Anne R. Bord, upon which the respondent relies.

As an alternative proposition in respect of the period of limitations for assessment, the respondent claims that, whether or not Section 47-1586i(c) applies, the assessment against Victor Block was valid under the provisions of Section 47-1586i(a)(3) of the Code which provides:

"if the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding

in court for the collection of such tax may be begun without assessment at any time within five years after the return was filed;"

It is true, as the respondent contends for the first time in its brief, that the petitioner, Victor Block omitted "from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return" which he filed for the calendar year 1958. Nevertheless its claim for an exception is not available to it. Such claim is an affirmative defense or matter and the burden of its maintenance is on the respondent. Rule 9 of this Court provides that "Every material allegation of fact set forth in the petition shall be deemed to be denied by the District of Columbia; and no answer shall be required, *except when the District shall rely upon new and affirmative matter or defense,*". (*Emphasis supplied.*) The respondent did not file an answer. It cannot now rely upon the fact that the petitioner did actually omit from his return more than 25 per centum of the gross income stated in the return. It is true that the evidence which was adduced indicated that the petitioner had omitted more than 25 per centum of gross income shown on his return, but the respondent was not only required to prove that fact but to plead it by the filing of an answer. *H. G. Stevens*, 14 B.T.A. 1120, 1123. See also: *C. A. Reis*, 1 T.C. 9, 13; *American Ideal Cleaning Co.*, 30 B.T.A. 529, 531; *Farmers Feed Co.*, 10 B.T.A. 1069, 1076. The Court must hold that the assessment of the deficiency was too late, and was void.

II

Dividend

The facts, briefly stated are the following.

Sedgwick Gardens, Inc., hereinafter called "the corporation" was a Maryland Corporation. Its capitalization was \$72,000, equally divided between the four stockholders

following: Lily Friedland, Anne R. Bord, Harry D. and Philip Goldstein, Trustees under the will of Samuel Goldberg, deceased, and the Ellis P. Block Trust. For several years prior to January 10, 1958, the corporation was the owner and operator of apartment house property in the District, hereinafter called "Sedgwick Gardens" managed by the real estate firm of Randall H. Hagner & Company, hereinafter called "Hagner", and particularly by the petitioner Ned Bord, one of its employees and the husband of the petitioner and stockholder, Anne R. Bord.

For sometime prior to January 10, 1958, negotiations for the sale of Sedgwick Gardens to a customer of the real estate firm of Legum & Gerber Realty Company was carried on between that company and Ned Bord. Apparently from the testimony of Ned Bord an understanding or verbal agreement as to the price was reached about the first part of January, 1958, and the matter was submitted to the stockholders. The exact date of the understanding or verbal agreement as to price is difficult to determine because of the character or nature of Bord's testimony, but at any rate the minutes of the corporation reflect that on January 10, 1958, the Board of Directors of the corporation adopted, and its stockholders approved a resolution to the effect that, "as speedily as practical, but in any event not later than December 31, 1958," the corporation should be dissolved and liquidated and its assets distributed to its stockholders.

There was introduced in evidence a paper purporting to be a contract of sale of Sedgwick Gardens for \$1,100,000.00 in the form of a receipt for the part payment of \$50,000, between Legum & Gerber Company and its customer Darwin Corporation dated January 17, 1958, which was accepted on January 27, by the stockholders of the corporation, who were designated as "SELLERS".

The corporation ordered the examination of title to Sedgwick Gardens from The Real Estate Title and Colum-

bia Title Insurance Companies, hereinafter called "the Title Company", with instructions to settle the transfer, which was accomplished on February 28, 1958, by the execution and delivery of a deed signed solely by the corporation to another corporation, known as "3726 Connecticut Ave., Inc.", the assignee of Darwin Corporation; and by the payment by the Title Company of one-fourth of the net proceeds of the sale or \$203,373.78 to each of the stockholders, in accordance with the instruction from the corporation, signed by its Vice-President, Ned Bord.

Sedgwick Gardens was operated during the period from January 10, to February 28, 1958, by Hagner for the sole benefit on account of the corporation. The commission due Legum & Gerber Realty Company for the sale of the property was paid from the account which Hagner maintained with the corporation and into which all rents from Sedgwick Gardens were deposited and from which all expenses were paid. The corporation reported rental receipts for the period ending February 28, 1958, in its income tax return filed with the assessing authority of the District. None of the stockholders reported such income in their income tax returns for the year 1958. Ned Bord, as Vice-President, and Victor Block, as Secretary, were employed and were paid a salary by the corporation during that period.

For some unexplained reason the sum of \$24,000 was diverted as the "Waiver of Contract Rights", which resulted in a deficit in the corporation's account for the period ending February 28, 1958, and in a corresponding reduction of its surplus. To meet the deficit and pay expenses the stockholders each contributed \$1,000, which turned out to be more than necessary so that \$616.84 was returned to each stockholder, making their contribution to the corporation \$383.16, which must be added to their respective capital investment of \$18,000. In other words, the paid-in capital (called "paid-in surplus" in the law) of each stockholder was \$18,383.16.

The corporation was dissolved on March 4, 1958, by the filing of formal articles of dissolution with the Tax Commission of Maryland, under the laws of which it was organized.

In addition to the cash paid by the Title Company to each of the stockholders, there was distributed to each of them as assets of the corporation the sum of \$4,357.10, resulting in a total distribution to each of \$207,730.88.

The assessing authority of the District determined that there was distributed to each of the stockholders of the corporation as a dividend out of its earned surplus the sum of \$189,730.88, which was the amount distributed to each, less \$18,000. The assessing authority described the last mentioned amount as "par value of stock" on the apparent assumption that such sum was paid in by each for the stock of the corporation. The assessment of the deficiencies here under attack were based upon that determination, and the determination that the dividends were taxable income under Section 47-1557a, which provides that "The words 'gross income' include * * * income derived from * * * dividends, * * *".

The Court is of the opinion that the assessment of the deficiencies against the petitioners, Ned and Anne R. Bord, and against the petitioners, Harry D. Goldstein and Philip Goldstein, Trustees under the will of Samuel Goldberg, deceased, to the extent that they were based upon the determination that the net amounts received by the stockholders were dividends and taxable income, were valid. In a later part of this opinion relating to the period of limitations in which assessments can be made the assessment against Victor Block is held invalid, otherwise the same ruling would be made in respect of that assessment as is made in respect of the other two.

The *Berliner* case,^{*} which the petitioners claim is not here applicable, involved, as do these cases, the dissolu-

^{*} 103 U.S. App. D.C. 351, 258 F. 2d 651, 86 W.L.R. 456.

tion of a corporation and the distribution of its assets to its stockholders. Instead of the sale of the capital stock by the stockholders, the corporation sold its assets to a purchasing corporation. The proceeds of the sale were distributed to the stockholders. The machinery of dissolution, among other steps, included the surrender of delivery by the stockholders of their certificates of stock. The assessing authority of the District determined that the amounts distributed to the stockholders, less their invested or paid-in capital, were respectively dividends and taxable income, and assessed deficiencies in income tax accordingly. The stockholders contended, as do the stockholders here, that the dissolution and distribution resulted in a sale, exchange or some form of a dissolution of a capital asset; and that the tax treatment thereof should be the same as provided in such instances in the Internal Revenue Code. This Court held otherwise and affirmed the assessment. On appeal to the United States Court of Appeals that decision was affirmed, that court holding:

"The District statute contains virtually the same definition of a dividend as the Federal statutes have contained since the 1916 Act, with the significant addition that in the District statute Congress included a specific provision that the term 'dividend' includes a distribution of earnings 'during, upon, or after liquidation.' Had Congress intended that such a distribution be treated as an exchange, we think it would have omitted the reference to liquidating distributions in the definition of a dividend and would have included a provision similar to that which has appeared in the Federal statutes uninterruptedly since 1924. We must therefore reject the taxpayers' contention that the transaction should be held to be an exchange, the gain from which is excluded from gross income by Section 47-1557a(b)(11)."

The *Oppenheimer* case,⁹ on which the petitioners rely, and which, they say, fits their cases, is materially different

⁹ 112 U.S. App. D.C. 239, 301 F. 2d. 563, 90 W.L.R. 559.

from the petitioners' cases. There the corporation did not sell the assets and realize the appreciation in assets, as was done in the *Berliner* and the petitioners' cases. What the corporation did in the *Oppenheimer* case to distribute the unrealized appreciation of assets to the stockholders. The assessing authority determined that the stockholders had received a dividend in an amount equal to the value of the assets as of the date of distribution, less the investment of the stockholders. This Court held, in conformity with the well established rule that such a distribution is not a dividend, that the assessment was invalid. On appeal to the United States Court of Appeals the decision was affirmed.

It is apparent that there is no material difference between the facts in these cases and those in the *Berliner* case.

The petitioners' contention that upon the adoption of the resolution providing for the dissolution of the corporation and the distribution of assets to its stockholders the stockholders *ipso facto* became the owners of Sedgwick Gardens. Such a contention is unique, to say the least, and is unsupported by any authorities. It is rejected by the Court. The cold fact is that the corporation sold its real property for \$1,100,000.00, and distributed the net proceeds of the sale to its stockholders. It was a live corporate entity, and remained so until the laws of Maryland relating to dissolution were complied with by the filing of the articles of dissolution with the State Tax Commission on March 4, 1958. *Rex Braugh v. Commissioner*, 32 B.T.A. 898, Appeal dismissed, 84 F. 2d 922. The gain which the corporation realized was part of its earned surplus, and the net distribution was a dividend. *Berliner v. District of Columbia*, *supra*.

It should be observed, in passing, that, even if the contention of the petitioners that they became the owners of Sedgwick Gardens by the mere adoption of the resolution

of dissolution and distribution were valid, it would not affect the tax liability of the petitioners. If they had become the owners, the property would have been a *non-capital* asset, since they would not have held the property two years. Their basis for determining taxable gain would have been their investment in the corporation, which has been assumed by all concerned to have been \$18,000.00¹⁰ in respect of each stockholder.

It should be observed, moreover, that in light of the fact of negotiations for sale that were carried on by the stockholders, even if the sale had been made in the name of the stockholders, the corporation would have been considered the grantor. *James Duggan v. Commissioner*, 18 B.T.A. 608; *Hellebush v. Commissioner*, 24 B.T.A. 660, affirmed 65 F.2d 902; *Trafford Oil & Gas Co. v. Commissioner*, 78 F.2d 814, Cert. den. 296 U.S. 630, 80 L.Ed. 448, 56 S.Ct. 154.

III

Basis

This issue is presented in the case of Harry D. Goldstein and Philip Goldstein, Trustees under the will of Samuel Goldberg, deceased. Those petitioners claim that, if the distribution upon the dissolution of Sedgwick Gardens, Inc., is a liquidating dividend, the correct basis, or that which must be deducted from the total amount received, was *not* the paid-in capital¹¹ of \$18,000 pertaining to the trustees, but the basis determined for Federal estate tax purposes at the death of the decedent, Samuel Goldberg, amounting to \$129,942.44, which represented the appraised value of the stock at that time.

The Court cannot agree with the petitioner's contention. That which is permitted in the law to be deducted from

¹⁰ Actually \$18,383.19.

¹¹ Called "paid-in surplus" in Section 47-1551c(m).

the amount distributed to stockholders upon the dissolution of a corporation is "paid-in surplus"¹² and that alone. What the petitioners are here asking, in effect, is that the distribution be given the same tax treatment as that provided in the Internal Revenue Code, which is what the taxpayers urged in the *Berliner* case, and what the United States Court of Appeals said could not be done. The "basis" mentioned in Section 47-1583(b)(3) is that to be used "for determining gain or loss from the sale, exchange or other disposition of property". Under the District of Columbia law the distribution of assets of a dissolved corporation to its stockholders is not a "sale, exchange or other disposition" of their intangible property, namely, the stock in the corporation. While those in charge of the dissolution may require or suggest that the stockholders send in their stock, compliance does not result in an "exchange" of the stock for the amount distributed, as such term is meant in the lexicon of taxation, nor is it a "disposition" within that meaning. The dissolution and distribution could have been legally carried out without the surrender of the stock. True the stock thereafter would have been worthless, but it could have still been held by the stockholders. The *Berliner* case clearly determined that the dissolution of a corporation and the distribution of its assets to its stockholders was not a "sale, exchange or other disposition" of the stock of the corporation.

IV

Bad Debt Deduction

This issue rises solely in the case of Ned and Anne R. Bord (Docket No. 1863). The petitioners claim that the assessing authority of the District erred in disallowing a deduction from gross income in the amount of \$86,708.99

¹² Interpreted in the *Berliner* and *Oppenheimer* cases to mean "paid-in capital".

claimed in their income tax return for 1958, and used in computing the taxable net income for that year.

Ned Bord was a stockholder, director and officer of Sun Radio Corporation. He claims that from time to time, due to the exigencies of that corporation's business, he advanced substantial sums of money to keep it a going concern. His efforts in that respect apparently were in vain, because some time in the early part of 1959 the corporation was declared a bankrupt in the United States District Court for the District of Columbia (Bankruptcy No. 21-59).

Ned Bord filed a claim for \$99,520.95 in the bankruptcy proceedings. Other officers or directors filed similar claims, and the National Bank of Washington filed a claim for \$33,000.00. At the same time the Trustee in Bankruptcy asserted a claim against the officers for misfeasance and nonfeasance in wrongfully diverting money from the corporation before it became bankrupt. The exact amount of the claimed diversion of funds and of the resulting claim by the Trustee in Bankruptcy was not disclosed. It can, however, be inferred from what occurred that it was in excess of the officer's claims and the claim of the National Bank of Washington. At any rate, there was proposed to, and approved by the United States District Court, and carried into effect the compromise or settlement set forth in a petition of the Trustee in Bankruptcy as follows:

"That your petitioner is informed and believes that NATHAN M. BROWN his counsel in this case, investigated into the books and records and affairs of the corporation, following which he entered into the negotiations for the purpose of attempting to compromise the claim of your trustee against the officers and directors of the corporation for recovery of the preferential payments, and to recover damages for wrongful diversion of funds of the corporation.

"That as a result of the negotiations between your petitioners' attorney and the attorney representing

the three principal officers and directors, namely: SAM GILDAR, NED BORD, and OSCAR FELKER, your petitioner has received, through his counsel, an offer to settle any and all claims of the trustee against the above-named individuals for the following consideration.

“(a) Mr. NED BORD will withdraw and release his claim in this bankruptcy proceeding as filed in the amount of \$99,520.95.

“(b) Mr. SAM GILDAR will release his claim in this bankruptcy proceeding as filed in the sum of \$34,521.00.

“(c) The aforesaid officers and directors will cause the National Bank of Washington to withdraw and release its claim as filed in this proceeding in the sum of \$33,000.00.

“In addition, Messrs. BORD, GILDAR and FELKER will pay to your trustee a total sum of \$15,000.00 in cash, payable in the following instalments:

\$5,000.00 on January 2, 1961
\$4,000.00 on February 1, 1961
\$3,000.00 on March 1, 1961
\$3,000.00 on March 31, 1961

“Your trustee is informed by his attorney and represents to the Court that the offer made by the above named principals is fair and equitable and in the best interest of this estate.”

As indicated above, the assessing authority in assessing the deficiency against the Bords disallowed the deduction represented by a claimed bad debt of the Sun Radio Corporation. The Court is of the opinion that the action of the assessing authority in that respect was proper. Even if it could be said that the advancements made by Ned Bord to the corporation were loans and not capital investments,

which is by no means certain (*CF: Eugene H. Rietzke*, 40 T.C. 443; *George P. Weddle*, 39 T.C., 493) whatever claim he might have had was offset by the claim which the corporation had because of the diversion of funds by him. Moreover, his claim was settled for a valid consideration. The weakness of his claim and the validity of the claim by the Trustee in Bankruptcy can be gauged by the fact that he not only relinquished his claim, but paid \$5,000 to the Trustee in Bankruptcy, and effected the settlement or withdrawal of the claim of the National Bank of Washington for \$33,000, which, it is assumed, was not accomplished for nothing.

It should be observed, as insinuated above, that it is by no means certain that Ned Bord ever had a valid claim against the Sun Radio Corporation; in other words, that the advancements were loans and not capital contributions. No evidence of reasons for the advance nor of any of the circumstances of the advancement, nor any fact, other than the bare statement that the advances were made, and his concession or admission that he was not in the money lending business, was submitted. The facts were peculiarly in the knowledge of Ned Bord. He not only made the advances, but he was a stockholder, director and president of the corporation. It must be assumed that, if the facts could have supported a finding that a loan was made, his astute counsel would have proved them. The only finding that can be made is that the advances were capital contributions, or at least, no finding that they were loans can be supported.

V

Negligence Penalty

The assessing authority of the District, because of failure to report taxable income, assessed Ned and Anne R. Bord a 5 per centum negligence penalty under Section 47-1589b(a) of the Code, which provides as follows:

"Additions to the Tax in the Case of Deficiency

"(a) *Negligence*.—If any part of any deficiency is due to negligence, or intentional disregard of rules and regulations but without intent to defraud, 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected and paid in the same manner as if it were a deficiency."

The petitioners, Ned and Anne R. Bord seek to excuse the negligence of not reporting taxable income by claiming that such failure was due to the advice of the accountant who prepared their joint return. The excuse is not valid. The imposition of the penalty was required by the above quoted section of the Code. Ned Bord was peculiarly familiar with the negotiations leading to the sale of the apartment property. The maneuvers of the transaction in which he participated indicate quite clearly that he was aware of the law as stated in the *Berliner* case. He knew that the corporation was the real grantor, and that the proceeds of the sale when distributed were taxable income. *Journal Company*, 46 B.T.A. 841 (Reversed on other grounds 134 F.2d 165).

VI

Conclusion

For the reasons stated the Court holds as follows:

Docket No. 1858

That a deficiency in income tax for the calendar year 1958, in the amount of \$18.16, plus interest in the amount of \$3.90, or a total of \$22.06 was erroneously assessed against, and collected from the petitioners, Harry D. Goldstein and Philip Goldstein, Trustees under the will of Samuel Goldberg, deceased; and that the petitioners are entitled to a refund thereof, with interest thereon at the rate of 4 per centum per annum from November 15, 1962, to the date of the payment of the refund.

Docket No. 1863

That a deficiency in income tax for the calendar year 1958, in the amount of \$18.16, plus a penalty of 91 cents, plus interest in the amount of \$4.38, or a total of \$23.45, was erroneously assessed against, and collected from the petitioners, Ned Bord and Anne R. Bord; and that the petitioners are entitled to a refund thereof, with interest thereon at the rate of 4 per centum per annum from February 14, 1963, to date of the payment of the refund.

Docket No. 1866

That deficiency in income tax for the calendar year, 1958, in the amount of \$2,994.47, plus interest in the amount of \$673.75, or a total of \$3,668.22, was erroneously assessed against, and collected from the petitioner, Victor Block; and that the petitioner is entitled to a refund thereof, with interest thereon at the rate of 4 per centum per annum from January 9, 1963, to the date of the payment of the refund.

Decisions will be entered in accordance with this opinion.

JO V. MORGAN

Judge

APPENDIX A
SEDGWICK GARDENS, INC.

Statement of Operations

For the Two Months Ended February 28, 1958

INCOME:

Rental Income	\$25,227.75	
Miscellaneous Income	129.70	
Total Income		\$25,357.45

EXPENSES:

Advertising	\$ 43.50
Amortization of Loan Expense	266.74
Depreciation—see schedule attached	2,873.44
Electricity	468.20
Exterminating	15.00
Fuel	2,743.35
Gas	54.63
Insurance	504.85
Interest	1,911.67
Laundry	119.24
Management Fee	756.84
Miscellaneous	77.69
Legal and Audit	1,177.00
Repairs & Maintenance:	
Elevators	172.00
General	402.00
Painting and Redecorating	251.98
Plumbing and Heating	180.36
Salaries—Officers	4,000.00
Salaries—Others	4,485.83
Supplies	414.66
Taxes:	
General	158.38
Payroll	345.31
Real Estate	2,227.68

Telephone	383.33
Trash Removal	53.00
Water	496.74

Total Expenses

24,583.42

Net Profit for D. C. Tax Purposes	\$ 774.03
Less: D. C. Income Tax Accrued	38.70
Net Profit for Federal Tax Purposes	<hr/> \$ 735.33 <hr/>

ANALYSIS OF SURPLUS

SURPLUS:

January 1, 1958	\$17,883.23	
Profit for Period	735.33	\$18,618.56

Write-off of Contract Rights	\$24,000.00	
Accrued Federal Income Tax	220.60	24,220.60

SURPLUS:

February 28, 1958	<hr/> \$(5,602.04) <hr/>
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APPENDIX B

Filed Nov. 15, 1963

BALANCE SHEETS

A Part of the Income Tax Return of
SEDGWICK GARDENS, INC.

For the Year Ending February 28, 1958

	Beginning of Taxable Year		End of Taxable Year	
	Amount	Total	Amount	Total
ASSETS				
Cash		\$ 50.00		\$ —0—
Notes and accounts receivable				
Less Reserves for bad debts		31,921.15		28,437.70
Inventories (a) Raw materials				
(b) Work in proce				
(c) Finished goods				
(d) Supplies	\$ 300.00	300.00		—0—
U.S. and State obligations				
Other securities				
Depreciable assets	\$521,267.92		\$521,859.52	
Less: Reserve	281,082.80	240,185.12	283,956.24	237,903.28
Land		86,328.65		86,328.65
Other assets				
Prepaid Assets	\$ 2,900.59		\$ 15.31	
Contract Rights	24,000.00		—0—	
		26,900.59		15.31
Total Assets		\$385,685.51		\$352,684.94

LIABILITIES

Accounts payable			
Bonds, notes, mortgages payable			
(a) Original maturity less			
(b) Original maturity year			
		\$277,500.00	\$277,500.00
Accrued exp. Operating	\$ 5,445.48	\$ 750.00	
Accrued Interest	3,638.33	5,550.00	
Accrued Taxes	9,218.49	2,486.98	
		18,302.28	8,786.98
<hr/>			
Surplus reserves:			
Net Worth			
Capital Stock	\$ 72,000.00	\$ 72,000.00	
Surplus	17,883.23	(5,602.04)	
		89,883.23	66,397.96
<hr/>			
Total Liabilities		\$385,685.51	\$352,684.94

DISTRICT OF COLUMBIA TAX COURT

Docket No. 1863

NED BORD and ANNE R. BORD, *Petitioners*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

Decision

This proceeding came on to be heard upon the petition filed herein; and upon consideration thereof, and of the evidence adduced at the hearings on said petition, it is, by the Court this 15th day of November, 1963,

ADJUDGED AND DETERMINED, That a deficiency in income tax for the calendar year 1958, in the amount of \$18.16, plus a penalty of 91 cents, plus interest in the amount of

\$4.38, or a total of \$23.45, was erroneously assessed against, and collected from the petitioners, Ned Bord and Anne R. Bord; and that the petitioners are entitled to a refund thereof, with interest thereon at the rate of 4 per centum per annum from February 14, 1963, to date of the payment of the refund.

JO. V. MORGAN
Judge

DISTRICT OF COLUMBIA TAX COURT

Docket No. 1863

NED BORD and ANNE R. BORD, *Petitioners,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

**Motion for Reconsideration for Further Hearing
and to Revise Findings of Fact**

This motion, filed pursuant to Rule 12(e) of the Court's Rules of Procedure, involves two of the issues heretofore decided by the Court. They are the bad debt deduction claimed by the petitioners and the question of the statute of limitations.

I

With respect to the bad debt issue, it should first be pointed out that the Court's opinion seems to be at least partially based on its doubt that the petitioners have established that the advances to Sun Corporation were loans rather than capital contributions. Recognizing, of course, that the Court is not bound by the theories relied on by the parties, we nevertheless call attention to the fact

that the respondent never questioned the fact that petitioner Ned Bord had made loans to the Sun Corporation, nor did it contend that the advances were capital contributions.

Secondly, it must be clear that the Trustee did not regard the funds advanced as anything other than loans. If on the basis of the evidence available to him, he would have formed the opinion that Bord made contributions of capital, he would have been under a duty to so advise the Bankruptcy Court. He would then have been required to deny the claim—not compromise it—as it is clear that as a contributor of capital, Board would not have been permitted to share in any dividend on an equal basis with general creditors.

The factual background relating to this question of loan vs. capital contribution was not explored at the original hearings, for neither party was aware that this would become important. The petitioners believe that the books and records of the corporation will disclose the nature of these transactions and that petitioners will be able to offer other testimony directly bearing on this question.

It should also be noted that the mere fact that the advances may be held to be capital contributions would not necessarily deprive the petitioners of the entire deduction. If the advances are indeed bad debts, they are deductible under Section 47-1557b(a)(5), D.C. Code (1961). If they are capital contributions, made for the conservation and maintenance of property, even if they are transactions not entered into for profit, they are deductible losses under Section 47-1557b(4)(B), D.C. Code (1961). The latter provision is limited by the requirement that the loss is deductible only to the extent that it is not a capital loss, as that term is defined in Section 47-1506. Accordingly, it becomes important to determine the time at which the advances were made. This also would be the subject of testimony upon a further hearing in this matter.

Finally, it has come to the attention of petitioners' counsel, since the decision was rendered, that Mr. Raymond Gittelman, who was petitioner Ned Bord's attorney in the bankruptcy proceeding, will be able to offer testimony relating to the settlement that was entered into with the Trustee in Bankruptcy.

For all of the foregoing reasons, petitioners respectfully submit that a further hearing in this case is appropriate.

II

The petitioners move the Court to strike Finding of Fact 17(b).

This finding relates to the alleged omission of more than 25% of the petitioners' gross income. First, all submit that in view of the Court's resolution of the principal questions in the case, especially the ruling that the three-year statute of limitations had not expired, the finding referred to is unnecessary. More importantly, however, we contend that there was insufficient evidence before the Court to arrive at such a finding. The Court has ruled in Docket No. 1868, Victor Block, that the respondent had the burden of proof to allege and prove the exception to the statute of limitations contained in Section 47-1586i(a)(3) of the Code. As the Court said on page 24 of the opinion:

"It is true that the evidence which was adduced indicated that the petitioner had omitted more than 25 per centum of gross income shown on his return, but the respondent was not only required to prove that fact, but to plead it by the filing of an answer."
(citing cases)

In this respect, the District proceeded in the Bord cases as it did in the Block case. That is, it filed no answer and offered no evidence to avail itself of the foregoing provision of law. It might be said that notwithstanding this failure to plead on the part of respondent, the Court can make the

finding in question on the basis of the petitioners' own evidence. We submit, however, that this is not the law. Since the petitioners were partners in 14 partnerships from which they reported income on their return, the Court would have to consider their distributive share of the gross income of each such partnership to reach the conclusion that the requisite percentage of income was or was not in fact omitted. This is now provided by statute in Federal tax law (Section 702(c), 1954 I.R.C.) and it was the accepted case law prior to this enactment. See the cases cited on page 3 of our reply brief, and particularly Internal Revenue Ruling 55-415, C.B. 55, p. 412 which expressly acquiesces in this rule. The petitioners were under no duty to supply the facts regarding the gross income of the various partnerships. That burden was on the respondent, and it having failed to meet that burden, this finding of fact should not stand.

Respectfully submitted,

Werner Strupp
Attorney for Petitioners

**Memorandum in Opposition to Motion of Petitioners to Vacate
Decision, for Reconsideration, for Further Hearings, and
to Revise Findings of Fact**

Petitioners Ned Bord and Anne R. Bord have filed a motion to vacate the decision entered in this case on November 15, 1963. The aforementioned petitioners have also filed a motion for reconsideration of this Court's decision and for a further hearing.

Petitioners Ned and Anne R. Bord now wish to offer evidence with respect to the bad debt issue involved in this case. They point out the fact that the Court decided the bad debt issue on a theory that was not relied on by either party. No evidence was introduced by petitioners Ned and Anne Bord at the trial of this case as to the nature of the advances that were allegedly made to the Sun Corporation. Petitioners Ned and Anne Bord now assign as a reason for

a further hearing that the respondent never questioned the fact that petitioner Ned Bord made loans to the Sun Corporation, nor did respondent contend that the advances were capital contributions.

Petitioners Ned and Anne R. Bord had the burden of proving that the taxes assessed against them for the years involved were invalid. This failure of proof relating to the bad debt issue prevented petitioners from overcoming the presumption of validity which attached to the assessments involved herein as it relates to the bad debt issue. Therefore, petitioners ought not now be allowed to come before the Court after the case has been decided to introduce evidence that was readily available to them at the time this case was tried.

Petitioners in their motion to revise the Findings of Fact have asked that the Court strike finding of fact 17(b). This finding relates to the omission of more than 25 per cent of petitioners' gross income from their District individual income tax return. Here, petitioners contend that there was insufficient evidence before the Court to arrive at such a finding. While it is true that the Court did not accept the District's argument, the Court was still at liberty on the evidence that was before it at the time to make a finding of fact in regard to the amount of gross income omitted. Such a finding was made and became this Court's finding of fact 17(b). The Court did state in relation to a similar finding of fact made as to Victor Block as follows:

"It is true that the evidence which was adduced indicated that the petitioner had omitted more than 25 per centum of gross income shown on his return, but the respondent was not only required to prove that fact, but to plead it by the filing of an answer."
(citing cases)

The evidence introduced by the District, namely, the returns of both Ned and Anne R. Bord and Victor Block,

was the same, and the above-referred to statement could apply equally as well to Bord. Petitioners now point out that they were partners in 14 partnerships from which they reported income on their joint District of Columbia individual income tax return, and that the Court would have to consider the distributive share of the gross income from each partnership in order to reach the conclusion that the requisite percentage of income was or was not in fact omitted. Petitioners cite certain sections of the 1954 Internal Revenue Code and a particular Internal Revenue Ruling, both of which are not applicable to the District law involved. Petitioners further state that they were under no duty to supply the facts regarding the gross income of the various partnerships involved, and that the burden was on the respondent to do so. However, this fact does not prevent the Tax Court from making a finding of fact on the evidence that was before it during the trial of these cases.

For the foregoing reasons, petitioners' motion to vacate the decision of this Court, their motion for reconsideration, their motion for further hearing, and their motion to revise the Findings of Fact should be denied.

s/ CHESTER H. GRAY
Chester H. Gray
Corporation Counsel, D.C.

s/ HENRY E. WIXON
Henry E. Wixon
Assistant Corporation Counsel, D.C.

s/ ROBERT E. McCALLY
Robert E. McCally
Assistant Corporation Counsel, D.C.

Attorneys for Respondent
District Building, Washington, D.C.

**Petition for Review of a Decision
of the District of Columbia Tax Court**

To the Honorable Chief Judge and Circuit Judges of the United States Court of Appeals for the District of Columbia Circuit:

1. Ned Bord and Anne R. Bord petition for review by the United States Court of Appeals for the District of Columbia Circuit, of a decision of the District of Columbia Tax Court made in the above-entitled case.

2. The decision of which review is sought partially affirmed an assessment of income taxes for the taxable period ended December 31, 1958.

3. The decision of the Tax Court was entered on November 15, 1963; the petitioners' motions to vacate the decision, for reconsideration, for further hearing and to revise findings of fact, were denied on January 9, 1964.

Attorney for Petitioners

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

10

Harry Goldstein

was called as a witness herein, and after being duly sworn, testified as follows:

• • • • •

18 Q. Did there come a time when the directors and
stockholders of Sedgwick Gardens, Inc., determined
19 to liquidate and dissolve the corporation and to dis-
tribute to the stockholders the assets remaining aft-
er payment of the corporated debts? A. Yes, sir.

Q. When did that determination take place? A. On
January 10, 1958.

• • • • •

25 By Mr. Kertz:

• • • • •

Q. Did there come a time when you were advised
that a offer had been received to purchase the real estate
known as Sedgwick Gardens? A. Yes, sir.

Q. Can you state the date on which such information
came to your knowledge? A. January 7, 1958.

Q. January 7? A. January 17; January 17, 1958.

• • • • •

26 Q. Did there come a time when a contract to pur-
chase Sedgwick Gardens was submitted to you for
acceptance or rejection? A. Yes, sir.

Mr. Kertz: I ask that this be marked as Petitioners'
Exhibit No. 6.

(Whereupon, the document referred to was marked for
identification as Petitioner's Exhibit 6.)

Mr. Kertz:

Q. I hand you a two-page document marked for identi-
fication as Petitioners' 6 and ask you if you can identify it.
A. Yes, sir; this is an offer to purchase the Sedgwick

Gardens Apartments under date of January 17, received from the Darwin Corporation, in the amount of \$1,085,000—

The Court: It speaks for itself. Did you sign it?

The Witness: Yes, sir.

Mr. McCally: What is the date on that, again?

The Witness: 17th of January.

• • • • •

27 Q. On what date did you sign the contract of sale?

A. January 27, 1958.

Q. Was the sale which was the subject matter of this contract marked for identification as Petitioners' Exhibit 6—Was that sale of the real estate ever consummated?

A. Yes, sir.

Q. Where and when was the sale consummated? A. At the title company in the Woodward Building at 15th and H Streets, Northwest, sir.

The Court: What was the date?

The Witness: Real estate—it was the Real Estate Title Insurance Company District of Columbia, under date of February 28, 1958.

By Mr. Kertz:

Q. Did you attend the settlement? A. Yes, sir.

• • • • •

29 Q. How did the title company treat the net proceeds of the sale? A. The net proceeds of the sale were distributed to the individual owners of the apartment and we as co-trustees received a check in the amount of 25 percent of the net receipts after all expenses were deducted from the total sale.

Mr. Kertz: I ask that this document be marked for identification as Petitioners' Exhibit 7.

(Whereupon, the document referred to was marked for identification as Petitioners' Exhibit 7.)

By Mr. Kertz:

Q. I hand you a sheet entitled "Statement of Account," marked for identification as Petitioners' Exhibit 7, and ask you if you will identify that. A. This is the settlement sheet from the Real Estate Title Company for the sale of the Sedgwick Gardens Apartments, in which we received one-fourth of the net in the amount of \$203,373.79, as one-fourth owner of the apartment.

Mr. Kertz: I would like to have marked as
30 Petitioners' Exhibit Number 8 a photostatic copy of a letter from the Maryland State Tax Commission, addressed to Sedgwick Gardens, Inc., advising that articles of dissolution of Sedgwick Gardens, Inc., had been received and approved by the State Tax Commission of Maryland on March 4, 1958. Counsel for respondent has indicated that he has no objection.

The Court: Very well.

(Whereupon, the document referred to was marked for identification and was received in evidence as Petitioners' Exhibit No. 8.)

Mr. Kertz: I offer in evidence as Petitioners' Exhibit Number 9 a photostatic copy of Corporation Franchise Tax Return for the period beginning January 1, 1958 and ended February 29, 1958, of Sedgwick Gardens, Inc.

The Court: Mr. McCally, do you object?

Mr. McCally: No, your Honor.

The Court: That will be received in evidence.

(Whereupon, the document referred to was marked for identification as Petitioner's Exhibit 9 and was received in evidence.)

• • • • •

34 Mr. McCally: Your Honor, in relation to the deed from Sedgwick Gardens to the Darwin Corporation, counsel for petitioners are willing to stipulate that such deed was executed on February 28. Later we will submit a

copy of this deed in evidence as Respondent's Exhibit 1, or A. I do not have such a copy at this time. I have had trouble getting it photostated. I understand there will be no objection to it.

Mr. Strupp: That is agreeable, your Honor.

39

Ellis Block

was called as a witness herein, and after being duly sworn, testified as follows:

By Mr. Strupp:

41

Q. Did you participate in the meeting of the board of directors, reflected on these minutes which have been admitted into evidence as Petitioners' Exhibit 11? A. Yes, sir.

42

Q. What did you do, if anything, after this meeting, relative to the final disposition of the property? A. Well, I ultimately signed the contract for the sale of the property.

The Court: All right.

By Mr. Strupp:

Q. Did you have any part in the negotiation of that? A. Yes. I participated in the negotiation for the sale.

43

Q. Did you engage any other person? A. There were brokers; Legum and Gerber was the real estate firm, and it was afterwards determined they sold the property to the Darwin Corporation. They brought in a contract which, after negotiation and changes, was accepted by all the liquidating stockholders, which is here, I suppose.

Mr. Strupp: Your Honor, I believe this is the same contract that is already in evidence.

The Court: Did he sign it?

Mr. Strupp: I am going to ask him.

By Mr. Strupp:

Q. Is this the contract you are referring to, Mr. Block?

A. Yes, sir.

Q. You signed it? A. Yes, sir.

Q. I show you Petitioners' exhibit admitted into evidence as Exhibit No. 7, the settlement sheet, and ask you if you attended that settlement. A. Yes, sir. I was at the settlement.

Q. The settlement sheet reflects the proceeds being paid in quarterly proportions to certain individuals. Do you know why this was done this way? A. It was done because the individual stockholders as liquidating trustees were entitled to the proceeds.

44 The Court: What he means is, were any instructions——

By Mr. Strupp:

Q. Was this done pursuant to any direction? A. It was done pursuant to the contract and also pursuant to a letter given to the Columbia Title Company by Mr. Bord, and——

Q. Do you recall—— A. —I don't recall who signed——

Mr. Strupp: We will call Mr. Bord, your Honor.

The Court: From whom was the letter written?

Mr. Strupp: The letter was written by Mr. Bord in his capacity as a corporate officer. He will testify with respect to that.

The Court: All right.

By Mr. Strupp:

Q. It has been agreed upon by counsel that the deed went directly from the corporation to the purchasers. A. That is right.

Q. Do you have any knowledge relative to that? A. It would have been unnecessary to have made two deeds out

of the corporation to the individuals and from the individuals to the ultimate purchaser, when we could have done it with one deed to carry out our intentions.

Q. Was there any discussion at the time of settlement relative to this? A. I think there was at the title company, yes. Yes, sir.

• • • • •

47 Q. When did you receive the proceeds from the sale? Do you recall? A. Several days after the settlement.

Q. What did you do with the—I assume it was in the form of a check. A. Yes, a check; deposited in the account of the Ellis P. Block Trust.

• • • • •

48 Cross Examination

By Mr. McCally:

Q. What part in this distribution did Legum and Gerber play? A. They were the real estate brokers who secured the purchaser.

Q. They were agents for whom, now? A. We paid them a commission.

The Court: No. He asked you whom they were representing.

The Witness: They were representing both parties, I should think. Because they disclosed to us who their purchaser was, and we negotiated about the commission.

The Court: He wants to know—Somebody, an individual or a corporation, got in touch with—

The Witness: They got in touch with them, I imagine.

The Court: With whom?

The Witness: With Mr. Rosenthal, who was president and more or less substantial owner of this corporation who purchased the property.

The Court: Legum and Gerber were—

49 The Witness: The real estate brokers.

The Court: You said you took part in the transaction.

The Witness: With Legum and Gerber. They had a meeting with me and with Mr. Bord in my office when they brought up this original contract.

The Court: All right.

By Mr. McCally:

Q. Do you know if they received an agent's commission on this? A. Yes. We paid them a \$10,000 commission that was agreed on during the negotiations.

Q. I am going to hand you a photostatic copy of a check and ask if that is the check the agent's fee was paid with.

A. Yes, sir; it is.

• • • • •

50 Q. Why was Legum and Gerber paid on March 24, 1958, from the Sedgwick Reserve Account? A. At the settlement in order not to complicate the settlement with partially paid rents and partially accumulated bills we agreed that the Randall H. Hagner Company, who managed the building and had this account, would—

The Court: Was that in writing?

The Witness: The settlement sheet will show there were no charges back and forth. We agreed with Legum and Gerber—You mean in writing?

The Court: Yes. In writing?

The Witness: I don't recall. But that is the way it was done.

The Court: Anyhow, it was paid?

The Witness: Yes. This was money that accumulated between the time of the entrance of the contract of sale and the settlement date, and that was insufficient, and then each one of the liquidating stockholders, the individuals who had owned the property, contributed \$1,000 each to make up the deficiency, to have enough to pay Legum and Gerber their \$10,000.

The Court: You mean put it in the corporation?

The Witness: No; in the account. Not in the corporation.

This is a Randall H. Hagner account. It is just an identification of an account Randall Hagner had.

51 The Court: Wasn't it your corporation check?

The Witness: No. This is Randall H. Hagner's check.

By Mr. McCally:

Q. In whose name was the account? A. Randall Hagner's name. Well, they identified it as—It is on a Randall H. Hagner check, signed by Randall Hagner officers, and they identified it as a reserve account, for their own book-keeping purposes.

• • • • •
52 Ned Bord
• • • • •

By Mr. Strupp:

• • • • •
Q. What connection if any did you have with Sedgwick Gardens? A. I was office manager for many years. We finally negotiated for the sale of that property, with Legum and Gerber, when Mr. Block and we finally agreed on a price.

Q. You mentioned negotiations. Will you explain what happened. A. Legum and Gerber came to Mr. Block and me and suggested possible sale of Sedgwick Gardens.

The Court: When?

The Witness: It has been over a period of maybe a year or two previous to the final sale.

The Court: When was it?

The Witness: This began possibly in 1957 and—1957 or 1956, when they talked about possible sale. But we couldn't get together on the price.

The Court: Was that before the resolution dissolving the corporation?

The Witness: Yes, sir.

By Mr. Strupp:

Q. Negotiations had been going on a number of years prior to that? A. Yes, sir. Finally they came to the point where they made an offer that we thought was a justifiable sale. Of course, we considered depreciation, one thing and another. We agreed to a price, negotiated with the other owners, and got their acceptance, and finally signed a contract for the sale.

54 The Court: By "we" whom do you mean?

The Witness: Mr. Block and myself. Mrs. Bord, as a matter of fact, owned the stock. Being agent, I had been managing for Sedgwick/Gardens for a number of years. I got in touch with the Goldberg estate, and one other owner, who lives in New York, and having agreed among ourselves that this deserved consideration, we spoke then to Mr. Goldstein and got his tentative approval, and then, of course, we got the New York owner's approval. /

By Mr. Strupp:

Q. I show you this document marked Petitioners' Exhibit 6. Is that the contract to which you are referring? A. Yes.

Q. Did you sign the contract? A. No. Mrs. Bord signed the contract.

Q. Who is the party who lives in another city, that you mentioned? A. Lily Friedland.

Q. Did she sign the contract, as far as you know? A. Yes, sir.

Q. I show you this document, Mr. Bord, and ask you whether you can identify it. A. Yes, sir.

Q. Can you tell us what it is? A. It is a letter dated 55 dated February 28, 1958, addressed to Columbia Title

Q. Can you tell us what it is? A. It is a letter Insurance Company, and at their suggestion—

Q. Signed by whom? A. By me as vice-president of Sedgwick Gardens, as to the distribution of the funds.

Mr. Strupp: May I offer this as Petitioners' Exhibit Number 15?

Mr. McCally: No objection.

The Court: It may be marked and received.

(Whereupon, the document referred to was marked for identification as Petitioners' Exhibit No. 15, and was received in evidence.)

By Mr. Strupp:

Q. Under what circumstances was this written, if you know? A. At the suggestion of the Columbia Title Company. I think it was dictated at that company's offices.

• • • • •

60 Q. Do you know whether the disposition of the Sedgwick interest was reported on your 1958 D. C. return? A. It was not.

Q. Do you know why it was not?

Mr. Strupp: Your Honor, I think I have not mentioned before that the respondent has assessed the negligence penalty against Mr. and Mrs. Bord. It is in the petition, but I failed to mention it here, before. That is why I am asking this question.

The Court: All right.

61 A. No, it was not reported.

By Mr. Strupp:

Q. Do you know why not? A. On the advice of Sinrod and Tash, who handle my account.

Q. It has been stipulated between the parties that you claimed a deduction in the amount of \$86,000, representing worthless business loan to Sun Corporation, in your 1958 return, and that in Bankruptcy Action 2159 in the United States District Court you made claims in the total amount of \$99,520.95 against that bankrupt corporation. It has also been stipulated that under date of November 21, 1960, the trustee in bankruptcy submitted a proposed compromise to the Bankruptcy Court, whereby you would withdraw

those claims, he would withdraw certain claims against you and others, and that you would cause the National Bank of Washington to withdraw certain claims against the bankrupt.

It has been stipulated, also, that the Bankruptcy Court approved this compromise on December 21, 1960.

Do you know the circumstances that led up to this? A. Yes, sir.

Q. Could you explain? A. It was suggested by the attorney for the Trustee in Bankruptcy that they thought that they had a cause of action against me and the others as officers of the corporation, of negligence in the running of the business so it got as bad as it did.

62 They claimed it was a new theory, but they thought they had some justification in going to court. On advice of counsel, after several conferences, the amount of money they could have sued for was sizable, whether or not they could have sustained their conclusion I don't know, but anyway, it was suggested the amount of time and effort an attorney would take to defend a case like that, that we were better off to pay.

My share of it was \$5,000, and it was to be paid into the Bankruptcy Court, and they would in turn say, well, that will be compensation enough for whatever claims we think we may have against you for negligence in being an officer and a member of the board of directors in the running of the business.

The Court: You settled your claim?

The Witness: I knew there wasn't any chance, because of the assets——

Mr. Strupp: Your Honor, it has been stipulated that the final dividend received in the bankruptcy proceeding for unsecured creditors was four percent. So I think this has a bearing; but that is part of the stipulation.

• • • • •

The Witness: The reason for giving the \$5,000, knowing perfectly well, having been told by an attorney, that the chance of collecting any part of very little of my \$80,000, because of the assets of the corporation, I wasn't really giving up any appreciable amount of money, if any, and because of that, and because of the expense necessary to hiring an attorney to defend that particular phase, on advice of counsel, because of the attorney's fees, I did it.

Mr. Strupp: I have no further question.

The Court: How much were they going to sue you for?

The Witness: They never gave any indication.

The Court: They must have.

The Witness: They intimated they could have sued me possibly, because others than myself lost money—this was the Sun Radio Store at 10th and E Streets—

Mr. Strupp: Your Honor, if I may interrupt, I have examined the bankruptcy file. Nothing ever came before the court with respect to—

The Witness: They intimated they could sue me for as much as \$50,000 or \$60,000.

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67 Q. Do you have a license as a moneylender in the District of Columbia?

• • • • •

The Witness: I do not have a moneylender's license.

By Mr. McCally:

68 Q. Are you in the business of lending money? A. Occasionally, but not for profit.

• • • • •

69 Q. When Legum and Gerber were paid their commission on the sale, on March 24, 1958, were you familiar with the manner in which they were going to be paid? A. Yes.

Q. Were you aware that there was an account with Randall H. Hagner, marked "Sedgwick Account"? A. Yes.

Q. Was that a corporation account? A. I would say it was, probably.

• • • • •

70 Re-direct Examination

By Mr. Strupp:

Q. Mr. Bord, Mr. McCally brought out the fact that you have loaned money to this corporation, Sun Corporation, and I think he also asked you whether you loaned money to other companies or persons. You said yes, I believe. How many transactions over the past five years would you estimate you have engaged in of this nature?

• • • • •

71 The Court: I thought you gave me the impression that you were just a "pro bono publico," and didn't charge any interest.

The Witness: I don't mean to intimate that, sir. I may have been involved in some other business that may take money, and for the time being I would lend it money.

Mr. Strupp: I am trying to establish the frequency and the amounts in which this happened.

The Witness: I would say 20 or 30 times would not be unreasonable.

By Mr. Strupp:

Q. Within a five-year period? A. That is correct.

Q. Could you estimate the amount of money that would have been involved? A. Two or three hundred thousand dollars.

Q. Over a five-year period? A. Yes.

72 Q. Under what circumstances? Were these companies that you had an interest in? A. That I had an interest in, and they needed money temporarily,

and unfortunately sometimes permanently, and I didn't get back as quickly as I would have hoped.

Q. These were corporations? A. Corporate setups, yes.

Q. And you had ownership in these, stock? A. Yes, sir.

• • • • •

The Court: What was the name of the corporation that owed you some \$80,000?

The Witness: Sun Corporation. We purchased the Sun Radio business at Tenth and E Streets, sir.

The Court: Who did?

The Witness: Mr. Sam Gilder, Sam Felker and myself, and went into it purely as an investment.

The Court: When did you buy it?

The Witness: I believe around 1955 or 1956.

The Court: What happened to it? Was it successful, from the beginning?

The Witness: Unfortunately the answer is no.

The Court: What happened to it the first year? Do you recall?

The Witness: It made very little money, if any, sir.

73 It was absentee management, constantly. We had many management problems, and constant change of management. And at that time, sir, there was a complete reversal in that type of business. This was radios, things of that type.

The Court: You were an officer and director?

The Witness: Yes, sir.

The Court: Did you pay attention to the business?

The Witness: As much as I could under the circumstances.

The Court: Why didn't you quit before you did?

The Witness: That is a good question. I should have.

The Court: When should you have quit?

The Witness: My guess?

The Court: Yes.

The Witness: After the first year, to be honest.

The Court: That is when you learned your money was gone?

The Witness: I learned we were losing money.

The Court: Then. But what about the condition of the corporation.

The Witness: We were constantly putting in money, in the hope of a change in business, so forth. It was a bad deal from its inception.

The Court: When did you learn that the business was practically gone, that the money was gone?

74 The Witness: Your Honor, I constantly put in money, hoping the business would get better. Then finally we decided we would have to go into bankruptcy. I couldn't afford to put more money in it. I had no further confidence in it.

• • • • •
The Court: You said Legum and Gerber for some time before January negotiated about the sale of this property?

The Witness: Any piece of real estate, as you know, some brokers always are asking whether property is for sale. We thought of depreciation, whether or not the price was high enough, the usual thing.

The Court: And you weren't satisfied with the price.

The Witness: The price we asked Legum and Gerber, or brokers two or three years previously, was not conducive to a sale as far as the individual brokers were concerned, or they didn't think they had buyers who would pay that price.

The Court: When did you learn they had that price?

The Witness: They came to us, your Honor, maybe 30 or 60 days, and disclosed who their buyer was, because he owns many pieces on Connecticut, and intimated he
75 could possibly because of his personal setup pay what we considered a premium price, and we were really concerned, because we did have a corporation, and the depreciation had reached a point of no return, and we had to get rid of the corporation——

• • • • •

77 Re-Cross Examination

By Mr. McCally:

Q. When did you get your real estate broker's license, Mr. Bord? A. 1930, or so.

Q. You are certain it is a broker's license, not just a salesman's license? A. I am sorry. It is a salesman's license. I have never been a broker. It is a salesman's license, under Randall H. Hagner.

Mr. McCally: Thank you, sir.

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78

Oliver W. Higgs

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By Mr. Strupp:

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Q. Did there come a time when you made recommendations as to the continued existence of the corporation or matters related to that? A. Yes. We recommended that the corporation be liquidated.

• • • • •

Q. When did you make that recommendation? Did you make it a number of times? A. As I recall, it was made, frankly, about the end of 1956, when we looked at the 1946 year-end results, and again in 1957 when we looked at those results.

81 Q. What led you to give this advice, what information? A. Primarily a cost situation to the owners, the tax cost of operating as a corporation by comparison with the tax cost had they operated as a joint venture or a partnership. The corporation, as I recall it, had gotten into the 52 percent tax bracket federally, and this tax could be saved by operating as a joint venture.

The Court: Isn't that true of any corporation?

The Witness: Yes, that is true with any corporation. That is correct.

By Mr. Strupp:

Q. What would have been the tax advantages in the event of liquidation? A. The tax advantages would have been two-fold, one from the standpoint of the entity itself upon liquidation, assuming liquidation at a fair market value; the joint venture, new joint venture, would have had a new basis for depreciation.

Secondly, from the standpoint of the shareholders.

Q. Excuse me: You said "new basis for depreciation". What do you mean? A. In recognizing fair market value upon liquidation.

The Court: You are thinking of the federal government, not the District?

The Witness: That is correct.

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83 Had you finished your answer?

The Witness: I started to say on the second portion of our thinking with respect to this liquidation, it was that in the case of one of these shareholders specifically we knew that by filing joint returns whatever the taxable amount would have been from the Sedgwick operations, because of other circumstances in the return it effectively—in effect would have become tax-free to the husband and wife on a joint return.

By Mr. Strupp:

Q. That was an advantage in this particular case, is that what you are saying? A. Right.

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84 Q. Directing your attention to the end of the month of February 1958 and the transactions that took place then how were these reflected on the books and records you kept?

• • • • •

86 The Witness: With respect to the sale these books would not reflect anything, the corporate books.

By Mr. Strupp:

Q. Sale of what? A. Of the property.

Q. All right. A. As far as operations are concerned they will reflect the operations through the month of February. At that point they will reflect a liquidation of the assets and taking over of the liabilities by the shareholders, closing out these books completely.

87 Q. As of what date? A. February 28.

The Court: Let me ask you this, since you have testified: The rents were treated as received by the corporation up to February 28?

The Witness: That is right.

By Mr. Strupp:

Q. Do you know when the settlement occurred, at what time? A. No, sir.

The Court: February 28.

The Witness: Except that was late in——

The Court: February 28.

• • • • •

88 Q. What occurred, if anything, among these papers, after the date of February 28, that was reflected subsequently in your records?

89 A. There would have been certain corporate obligations paid through this account subsequent to February 28, such as electric bills, gas bills, things of this nature.

Q. What period of time did those obligations cover? A. They would cover a period of time prior to February 28.

• • • • •

90 By Mr. Strupp:

Q. Is the \$10,000 commission reflected anywhere in these papers that are in evidence? A. Yes, but not there. It is reflected as being paid out of what is known as the reserve account.

Q. How did that operate? A. The monthly balance of cash would be transferred from a rental account of that month over to the account called the reserve account, and from funds built up in this account certain of this type of items would be paid.

The Court: Interest, and things like that?

The Witness: Corporate taxes, corporate income
91 taxes; this distribution—this commission was paid;
if there was distribution to the shareholders; things
of that type.

By Mr. Strupp:

Q. How did you handle this particular transaction on your books? A. This commission transaction, frankly, was charged as being a receivable from the shareholders. It was charged on the books.

Q. That is how it is reflected on your books and records? A. On the books of the corporation it was entered into an exchange account, and shows up as a receivable on the general ledger of the corporation.

Q. What was its ultimate disposition? A. Ultimately it was taken over in liquidation by the original shareholders as one of the assets of the corporation.

The Court: You mean the \$10,000 was taken over as an asset?

The Witness: That is right.

Mr. Strupp: In other words, the corporation, having advanced funds, acquired, actually, a receivable from its own stockholders.

The Court: I thought I understood accounting, but I guess I don't. Here is an account belonging to the corporation, and a check is drawn on it to pay a commis-
92 sion to someone else, so it gets into an asset of the corporation, which is really a debit of the corporation, but gets into an asset of the corporation by being put on the books as being paid by the stockholders, and winds up with the stockholders getting it as an asset in the distribution.

Mr. Strupp: It was paid on behalf of someone else.

The Court: But it was paid out of the corporate assets, corporate money.

Mr. Strupp: Yes. But if the stockholder had owed a department store bill in his own private capacity and the corporation had paid it for him it would have been handled in exactly the same manner, and if that were never repaid that would have been an asset to the stockholder that he would have received from the corporation.

The Court: I am still curious. Why did the corporation pay it at all?

Mr. Strupp: The corporation did not. Randall Hagner paid it out of funds——

The Court: Which belonged to the corporation.

Mr. Strupp: Out of funds which——

The Court: Someday it may have gone back to the stockholders?

Mr. Strupp: That is correct.

The Court: Let me ask you this: Suppose I am a stockholder in Woodward and Lothrop, and they pay
93 \$10,000, and two years from now they dissolve. If they had not paid that \$10,000 I as a stockholder, on dissolution, would have gotten a proportionate amount of that \$10,000?

Mr. Strupp: That is right.

• • • • •
108 The Court: He has an unliquidated claim that might be a good claim. If it is and he surrendered something he may have gotten income. But as far as 1958 is concerned, it is very much like a taxpayer setting up a reserve or taking a reduction in a year, for a bad debt, taking a deduction, and filed next year, or in a subsequent year—in a subsequent year he files and somebody has paid him the debt, and he has to declare it
109 as income; but he could always claim that deduction back in the first year.

Mr. McCally: We take the position the debt did not become a bad debt until 1960 when this petition was filed and that if he could claim it at all, of course, he could only claim it in 1960, with one other going-off here, the fact that he wasn't in the business of lending money, leaving that aside——

The Court: If the federal courts had been diligent—not only delaying the time in which the taxpayer finds out it is worthless, but they generally advance it. As a matter of fact, I think Mr. Bord knew before 1958, apparently, I mean there is some indication that he knew before 1958 that this was a bad debt. There is testimony susceptible of several interpretations, but he indicated that all along the thing wasn't doing very well, and he had put money down this rathole right along; but certainly by 1958 he knew it was valid. And I don't think this claim two years late would affect it.

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114

Oliver W. Higgs

was recalled as a witness, having been previously duly sworn, testified further as follows:

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By Mr. Strupp:

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115 Q. You are familiar with the transaction—you have testified to it before, involving Sedgwick Gardens?

A. Yes.

Q. That transaction reflected on this return? A. No, sir.
The Court: Doesn't it speak for itself?

Mr. Strupp: What I am getting to, Your Honor, is the question all that Mr. Higgs is here testifying to is the question of negligence, penalty and the fact that this transaction was not reported and the reasons for this.

The Court: You asked him what it showed.

Mr. Strupp: Yes.

By Mr. Strupp:

Q. Now, did you give Mr. Bord any advice relative to the reporting of this transaction? A. Well, that particular transaction was not reported on this return, frankly, because we felt that there was no profit on it and not being any profit, there was not any need to report it.

116 Q. Why did you think so? A. Well, we feel that the base in the hands of Mrs. Bord was equal to the selling price.

Q. What do you mean by base in this case? A. Well, her—the cost to her or the tax base in her 25 percent interest in the property which had been liquidated to her. We felt that this base was equivalent to the selling price, the sale having occurred almost simultaneously with the liquidation.

Q. Did you advise Mr. or Mrs. Bord of this?

The Court: That simply is a leading question. I would ask him whether he did.

By Mr. Strupp:

Q. Did you do anything relative to this? A. Well, we did not put it on the return. Frankly, we didn't feel there was a taxable transaction.

The Court: He wants to know what did you do to Mr. Bord with respect to Mr. Bord?

By Mr. Strupp:

Q. You are speaking about communications, now, between yourself and the taxpayer, if any? A. To be perfectly frank with you. I don't recall any. However, it is very possible that I may have pointed out to Mr. Bord that it was not on his return and the reason for it.

The Court: We are not concerned with possibilities. We like the facts.

117

By Mr. Strupp:

Q. However, you prepared this return? A. That is correct.

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SEDGWICK GARDENS, INC. .

MINUTES OF A SPECIAL MEETING OF BOARD OF DIRECTORS

* * *

A special meeting of the Board of Directors of SEDGWICK GARDENS, INC. was held at 1321 Connecticut Avenue, N. W., Washington, D. C., on January 10, 1958, at 2:00 P.M.

Present in person were Messrs. Ned Bord, Bernard Easterson, and Ellis P. Block, constituting a majority of the members of the Board.

The meeting was called to order by the Vice-President of the Corporation who stated that the purpose thereof was to consider the matter of liquidation and dissolution of the Corporation.

After discussion and upon motion duly made and carried, it was

RESOLVED, that in the opinion of the Board of Directors of this corporation it is advisable that the corporation be liquidated and dissolved, and that the assets of the corporation, after payment of corporate debts, be distributed among the stockholders in direct proportion to their stockholdings and in cancellation of such stock.

FURTHER RESOLVED, that the stockholders of the corporation be notified of the adoption of the foregoing resolution, and that if said stockholders consent thereto, the proper officers of the corporation shall, and hereby are directed to, forthwith proceed to liquidate and dissolve the corporation and to distribute the assets of the corporation, after payment of corporate debts, among the stockholders as speedily as practicable, but in any event not later than December 31, 1958.

There being no further business, the meeting thereupon adjourned.

VICTOR I. BLOCK
Victor I. Block,
Secretary

The foregoing minutes are approved:

BERNARD ELASTERSON

NED BORD

ELLIS P. BLOCK

All of the members of the
Board of Directors

SEDGWICK GARDENS, INC.

UNANIMOUS CONSENT TO DISSOLUTION

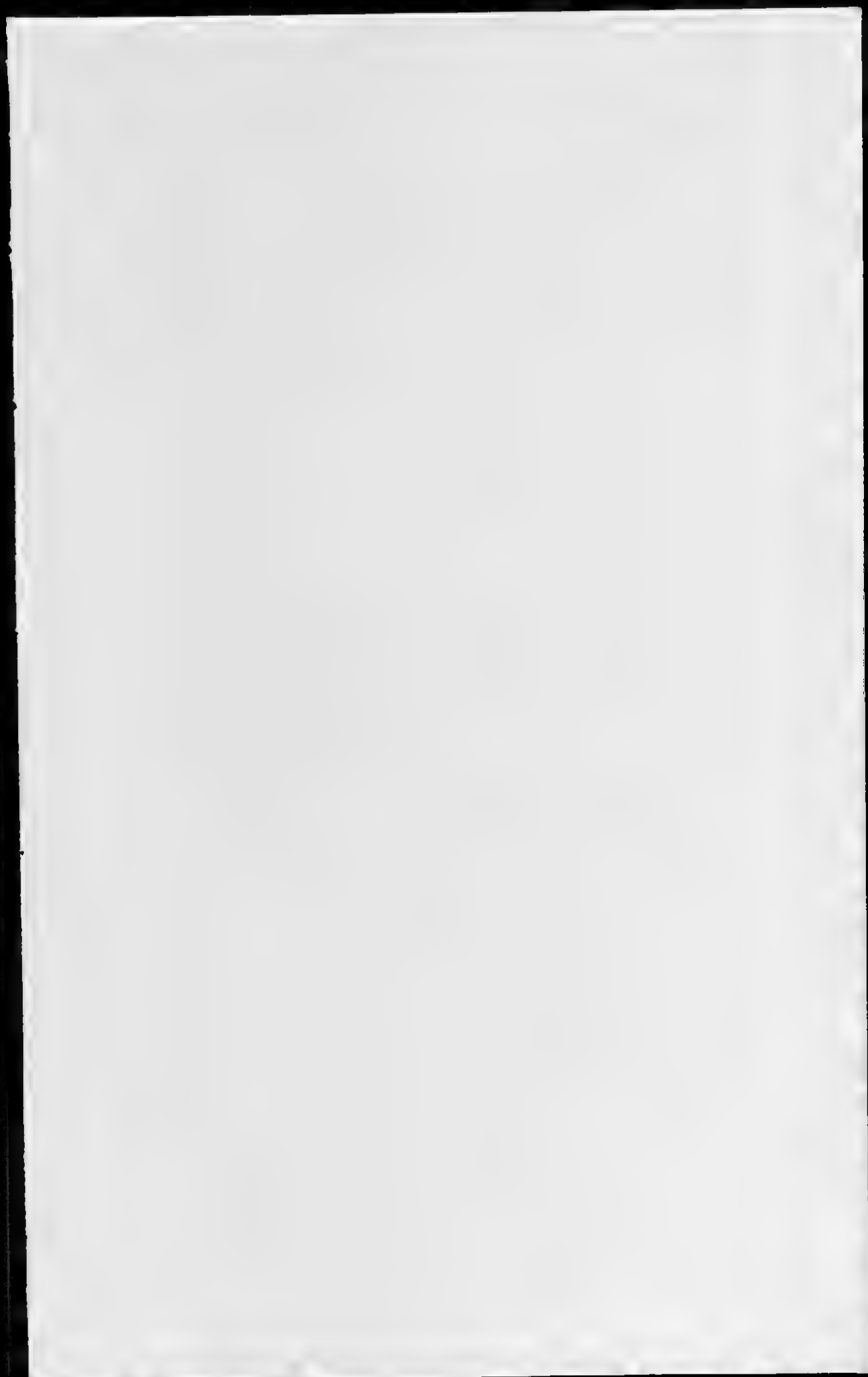
• • •

We, the undersigned, being the holders of all of the issued and outstanding shares of capital stock of SEDGWICK GARDENS, INC., a Maryland corporation, do hereby consent that said Corporation be liquidated and dissolved in accordance with the resolutions adopted by the Board of Directors of this corporation at its meeting held on January 10, 1958, and we do hereby ratify, confirm and approve each and every act of the directors and officers of this Corporation done in connection with such dissolution and liquidation.

WITNESS our hands this 10th day of January, 1958.

PHILIP GOLDSTEIN
HARRY D. GOLDSTEIN
Trustees U/W of Samuel
Goldberg, Deceased

ELLIS P. BLOCK TRUST
By ELLIS P. BLOCK, Sole Trustee
ANNE R. BORD
LILY FRIEDLAND



LEGUM AND GERBER REALTY CO.

Realtors

8315 CONNECTICUT AVENUE, N. W.

EMerson 2-9000



Washington 8, D. C., Jan. 17, 1958

RECEIVED FROM Darwin Corporation
a deposit of Fifty Thousand Dollars (\$ 50,000.00),
to be applied as part payment of the purchase of Lot 31 in Square 2060
with improvements thereon known as No. 3726 Connecticut Ave. N. W., Wash. D. C. upon the following terms of sale:
Total price of property One Million Eighty - five Thousand Dollars (\$ 1,085,000.),
Purchaser agrees to pay All Cash Dollars (\$ 1,085,000.),
cash at the date of conveyance, of which the deposit shall be a part.

The purchaser is to a first deed of trust secured on the premises of
Dollars (\$),
due , 19 , bearing interest at the rate of per annum, payable

The balance of deferred purchase money is to be secured by a deed of trust on said property, to be
paid in monthly installments of Dollars (\$),
or more, including interest at rate of per cent per annum, each installment when so paid to be applied, first to the pay-
ment of interest on the amount of principal remaining unpaid and the balance thereof credited to principal.

Trustees in all deeds of trust are to be named by the parties secured thereby.

The property is sold free of encumbrance except as aforesaid: title is to be good of record subject, however, to covenants, conditions and restrictions of rec-
ord, if any; otherwise, said deposit is to be returned and sale declared off at the option of the purchaser, unless the defects are of such character that they may
readily be remedied by legal action, but the seller and agent are hereby expressly released from all liability for damages by reason of any defect in the title. In
case legal steps are necessary to perfect the title, such action must be taken promptly by the seller at his own expense, whereupon the time herein specified for full
settlement by the purchaser will thereby be extended for the period necessary for such action.

Rents, taxes, water rent, insurance and interest on existing encumbrances, if any, and operating charges are to be adjusted to the date of transfer. Taxes,
general and special, are to be adjusted according to the certificate of taxes as issued by the Collector of Taxes of the District of Columbia, except that assess-
ments for improvements completed prior to the date hereof, whether assessment thereof has been levied or not, shall be paid by the seller or allowances made
therefor at the time of transfer.

Examination of title, tax certificate, conveyancing, notary fees and all recording charges, including those for purchase money trust, if any, are to be at the
cost of the purchaser, who hereby authorizes the undersigned agent to order the examination of title and to prepare all necessary deeds of conveyancing: pro-
vided, however, that if upon examination the title should be found defective, the seller hereby agrees to pay the cost of the examination of the title and ~~also~~
~~pay the agent herein the commission hereinafter provided for just as though the sale had actually been consummated and all the terms of this contract complied~~

Within 43 / settlement March 1st, 1958
days from the date of acceptance hereof by the owner, or as soon thereafter as a report on the title can be secured if promptly
ordered, the seller and purchaser are required and agree to make full settlement in accordance with the terms hereof. If the purchaser shall fail so to do, the de-
posit herein provided for may be forfeited at the option of the seller, in which event the purchaser shall be relieved from further liability hereunder, or without
forfeiting the said deposit the seller may avail himself of any legal or equitable rights which he may have under this contract. In the event of the forfeiture of
the deposit, the seller shall allow the agent one-half thereof as a compensation for his services.

Settlement is to be made at the office of the agent or at the Title Company searching the title. The placing with the Title Company or with the agent of the
purchase money, the deed of conveyance for execution and such other papers as are required by either party by the terms of this contract, shall be considered good
and sufficient tender of performance of the terms hereof.

Seller agrees to execute the usual special warranty deed, and to pay for revenue stamps on deed.

1. Property is sold subject to an existing tenancy as follows: Apartment house subject to present leases.

2. Seller agrees to give possession at time of settlement and in the event he or she shall fail so to do, he or she shall become and be thereafter a tenant by
sufferance of the purchaser and hereby waives all notice to quit, as provided by the laws of the District of Columbia.

The risk of loss or damage to said property by fire or other casualty until the deed of conveyance is recorded is assumed by the seller.

All notices of violations of Municipal orders or requirements noted or issued by any Department of the District of Columbia, or prosecutions in any courts
of the District of Columbia on account thereof against or affecting the property at the date of settlement of this contract, shall be complied with by the seller, and
the property conveyed free thereof. This provision shall survive the delivery of the deed hereunder.

~~THE SELLER AND PURCHASER HEREBY AGREE THAT THE SELLER SHALL BE RESPONSIBLE FOR THE PAYMENT OF ALL TAXES AND REVENUE STAMPS ON THE DEED OF CONVEYANCE AND THAT THE PURCHASER SHALL BE RESPONSIBLE FOR THE PAYMENT OF ALL TAXES AND REVENUE STAMPS ON THE DEED OF CONVEYANCE~~

Where the property sold under the within contract is located in Montgomery or Prince Georges County, Maryland, the words Montgomery or Prince Georges
County, Maryland, are to be substituted in the place of the words the District of Columbia; and the purchaser assumes the annual Washington Suburban Sanitary
tax and state revenue stamps on deed.

The principals to this contract mutually agree that it shall be binding upon their respective heirs, executors, administrators or assigns.

This contract when ratified by the seller contains the final and entire agreement between the parties hereto, and they shall not be bound by any terms, con-
ditions, statements or representations, oral or written, not herein contained.

It is further understood and agreed that: All furniture, tools, equipment
and machinery now on property and used in the operation of premises are
included in this sale. Also all refrigerators and ranges in apts. and stored
on premises.

LEGUM AND GERBER REALTY CO., Agent

By David H. Legum & Raymond J. Gerber

We, the undersigned, hereby ratify, accept and agree to the above memorandum of sale and acknowledge it to be our contract.

Jan. 17, 19 58 Darwin Corporation (Purchaser)
by: (Purchaser)
 Pres.

 , 19 (Seller)

 (Wife of Seller)

Property is to be conveyed in the name of

We, the undersigned, being liquidating stockholders of Sedgwick Gardens, Inc., do hereby accept the within contract for the sale of Lot 31 in Square 2060, in the District of Columbia, subject, however, to the following changes, namely:

1. That the price to be paid for said property shall be One Million One Hundred Thousand Dollars (\$1,100,000.00) all cash, of which the deposit is to be a part. Said price is to be NET to the Sellers, free of brokerage commissions.

2. That if the deposit is forfeited no commission or compensation is to be paid to the brokers, notwithstanding any other provision to the contrary appearing on the reverse side hereof.

Dated: January 27th, 1958

Harry D. Goldstein ^{Witness}
Philip Goldstein ^{Witness}
Lily Friedland

Ellis P. Block Trust
Ellis P. Block
Anne R. Bord
SELLERS

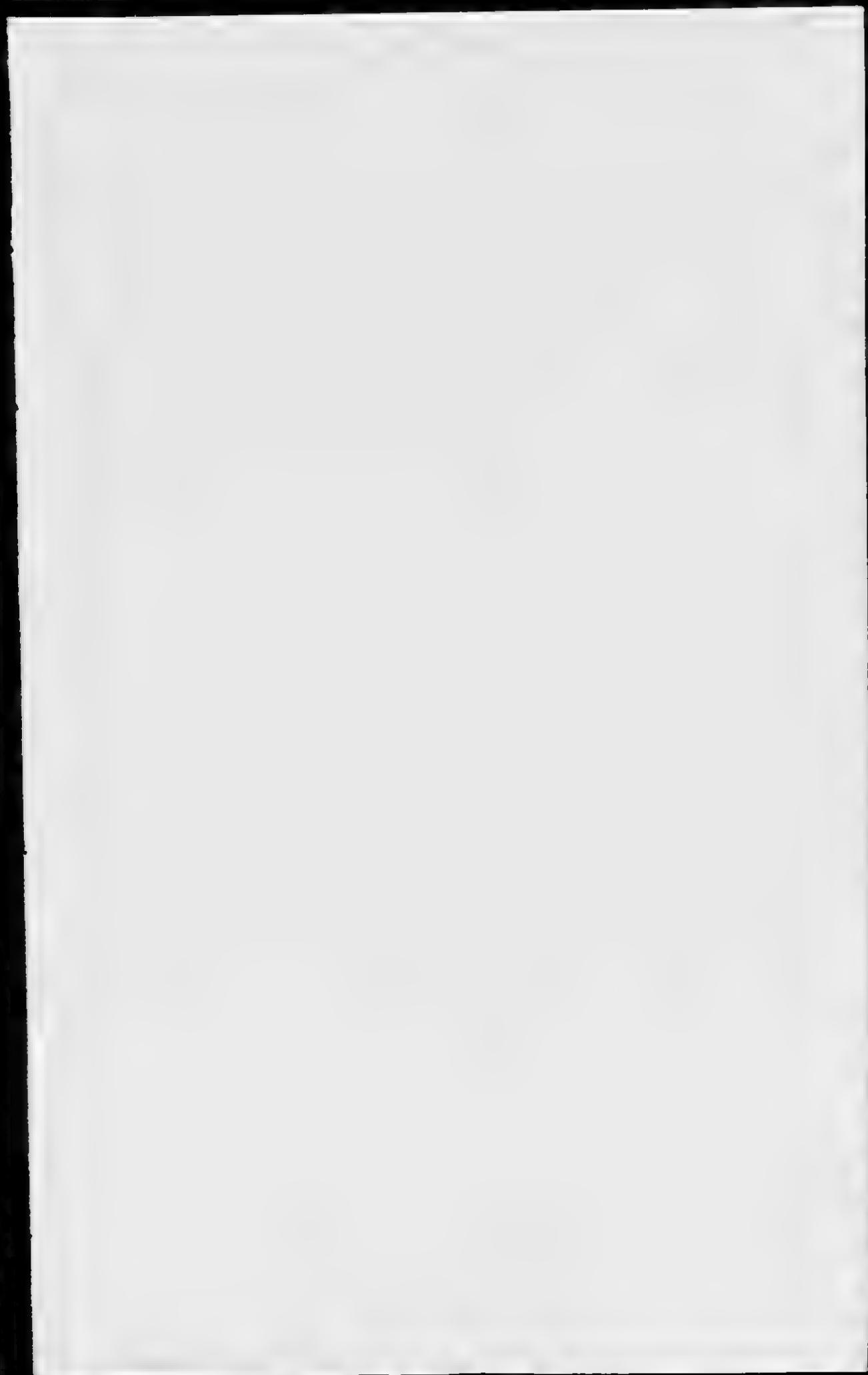
The foregoing changes are hereby accepted, this 27th day of January, 1958

DARWIN CORPORATION
By Dwight Rosenthal
PRESIDENT Purchaser

The foregoing provisions are approved:

LEGUM & GERBER REALTY CO.

By Paul H. Legum
Raymond J. Gerber



STATEMENT OF ACCOUNT

WITH

The Real Estate Title Insurance Company of the District of Columbia
 The Columbia Title Insurance Company of the District of Columbia

1422 H STREET N.W., WASHINGTON 5, D. C.

THESE COMPANIES DO NOT ASSUME RESPONSIBILITY FOR TAXES OR
 ASSESSMENTS EXCEPT AS REPORTED ON THE TAX CERTIFICATE
 ISSUED BY THE ASSESSOR OF THE DISTRICT OF COLUMBIA.

CORRECTNESS OF INFORMATION FURNISHED THESE
 COMPANIES AS TO PRINCIPAL AND INTEREST ON DEEDS
 OF TRUST ON THIS PROPERTY ARE NOT GUARANTEED.

RECORDING FEES ESTIMATED AND ARE SUBJECT TO ADJUSTMENT AFTER RECORDING.

Settlement Case No. 89177 TO Sedgwick Gardens, Inc. DR.In Re. Sale Lot 31 Square 2060 Date February 28, 1958

Price of Property		\$1,100,000.00
Insurance Fire, Theft, E.C. on garage pd to 4-8-58 \$25,000.00		7.67
Insurance Lia. pd to 4-8-58		7.64
Taxes pd to 12-31-57 at \$13,366.08	2,227.68	
Deed of Trust	277,500.00	
Interest fr. 9-4-57 (acc. \$2688.22)	5,550.00	
Release	12.50	
Trustee Fee	10.00	
Service Charges	10.00	
Revenue Stamps	1,210.00	
Balance to: Lily Friedland (1/2)	203,373.78	
Balance to: Anne R. Bord (1/2)	203,373.78	
Balance To: Ellis P. Block Trustee of Ellis P. Block Trust (1/2)	203,373.78	
Balance to: Harry D. Goldstein and Philip Goldstein Trustees under the Will of Samuel Goldberg, deceased (1/2)	203,373.79	
	1,100,015.31	1,100,015.31

State Tax Commission

21 LIGHT STREET
BALTIMORE 2, MD.

A 12306

Sedgwick Gardens, Inc.,
Baltimore, Md.

You are advised that the Articles of Dissolution
SEDGWICK GARDENS, INC.

have been received and approved by the State Tax Commission of Maryland
this 4th day of March, 1958 at 11:09 A.M. and will be recorded.

STATE TAX COMMISSION OF MARYLAND

by *R. S. Kerna*

PAGE 1

FORM D-20

To be filed with the Assessor, Municipal Center, 900 Indiana Ave., N. W., Washington 1, D. C., not later than the 15th day of the fourth month following the close of the taxable year. Make check payable to the Collector of Taxes, D. C.

Final Return!

DISTRICT OF COLUMBIA
Corporation Franchise Tax Return
For Calendar Year 1957

or fiscal year began Jan. 1, 1956 and ended Feb. 28, 1958

DO NOT WRITE IN THESE SPACES

File No. _____

DO NOT WRITE IN THESE SPACES

PRINT PLAINLY CORPORATION'S NAME AND BUSINESS ADDRESS

Audited _____

Sedgwick Gardens, Inc.

By _____

c/o Sinar and Tash, CPA's
D. C. Address 1725 Redden Street, N. W., City 6.

Additional Information Requested _____

Mailing Address _____
(Street and Number) (City-State) (State)

Delinquency Notice \$ _____

Kind of Business: Rental of Property Number of places of business: One

Interest Recommended \$ _____

TRANSACTION NUMBER

Date of Incorporation 1/7/37 State or Country Maryland

Is the corporation affiliated with a partnership or another corporation? No If so, explain _____

The corporation's books are in care of Sinar & Tash, C. P. A.'s Located at Washington 6, D. C.

State district in which Federal income tax return was filed for the period covered by this return Baltimore, Maryland

Is this return made on the accrual basis? Yes If not, describe basis used _____

Did you file a franchise tax return with the District of Columbia for the year 1956? Yes If not, state reason _____

Has the Internal Revenue Service made or proposed any adjustment in the Federal income tax returns filed by you or have amended returns been filed with the Internal Revenue Service by you for the years 1954? No 1955? No 1956? No If so, attach a detailed statement explaining such adjustments.

What is your business group code number as shown in item C on page 1 of your 1957 Federal income tax return, form 1120? _____

NET INCOME COMPUTATION

Where the entire net income is subject to the District of Columbia tax, use Column 3 only

READ INSTRUCTION SHEET BEFORE PREPARING RETURN		1. Schedule AA Within and without the District	2. P or A	3. Within the District
GROSS INCOME				
Item No.	Less income and allowance \$			
1. Gross sales (where inventories are an income-determining factor) \$				
2. Less: Cost of goods sold (from Schedule B)				
3. Gross profit from sales				
4. Gross receipts (where inventories are not an income-determining factor) \$				
5. Less: Cost of operations (from Schedule C)				
6. Gross profit where inventories are not an income-determining factor				
7. Interest on loans, notes, mortgages, bonds, bank deposits, etc. (See Instruction 11)				
8. Rents (Submit schedule of expenses related to this income which are included in "miscellaneous" below, in accordance with Instruction 13)				
9. Royalties				
10. Gain or loss from sale or exchange of assets other than capital (from Schedule D-1)				
11. Dividends (from Schedule K, column 1)				
12. Other income (Attach separate schedule, see Instruction 15)				
13. Total income in Items 3, and 6 to 12, inclusive				
DEDUCTIONS				
14. Total compensation of officers (including compensation to each person (From Schedule F) for services as any other capacity)				
15. Salaries and wages (not deducted elsewhere and including compensation described under item 14)				
16. Rent (See Instruction 16) (Insert name of owner of D. C. Property)				
17. Repairs (See Instruction 17)				
18. Bad debts (from Schedule G)				
19. Interest (See Instruction 18)				
20. Taxes (from Schedule H) (Do not include (a) franchise taxes imposed by D. C. Revenue Act of 1947, as amended, or (b) any Federal, District or other income taxes)				
21. Contributions or gifts paid (from Schedule J)				
22. Losses in trade or business, etc. (Submit schedule, see Instruction 23)				
23. Depreciation (from Schedule K)				
24. Depletion of mines, oil and gas wells, timber, etc. (Submit schedule, see Instruction 24)				
25. (a) Advertising (b) Amounts contributed under a pension, annuity, stock bonus, or profit-sharing plan, etc. (c) Other deductions authorized by law. (From Schedule L)				
26. Total deductions in Items 14 to 25, inclusive				
27. Net taxable income (Item 13 minus Item 26)				774.03

NET FRANCHISE TAX COMPUTATION

	Total Amount	Payment submitted herewith
A. Amount of tax (Five per cent of Item 27, column 3)	38.70	38.70
B. Penalty _____ %		
C. Interest to _____		
D. Total paid with this return		
E. Tax paid, if any, with application for extension of time in which to file		

Note: In column 3 use the letter "T" to indicate the use of apportionment factor and the letter "A" to indicate allocation.

PAGE 1

PAGE 1

PAGE 1

PAGE 1

PAGE 1

Schedule A—RECONCILIATION OF NET INCOME REPORTED IN FEDERAL AND DISTRICT OF COLUMBIA RETURNS			
Taxable income before net operating loss deduction and special deductions (Item 22, page 3 of Federal return)		\$	
Deduct net gain (or add net loss) (Item 13(a), 13(b) and/or 13(c), page 2 of Federal return)		\$	
1. Item 22 minus (or plus) Item 13, page 2 of Federal return		\$	
Unallowable deductions and additional income		\$	
2. Gains from sales or exchanges of assets, other than capital (from Sched. D-1)		\$	
3. State income taxes		\$	
4. District of Columbia income taxes, and Franchise Taxes imposed by D. C. Revenue Act of 1947, as amended		\$	
5. Other unallowable deductions and additional income (itemize):		\$	
(a)		\$	
(b)		\$	
(c)		\$	
6. Total (Lines 1 to 5)		\$	
7. Net taxable income reported (column 2, item 27, page 1 of District of Columbia return)		\$	
Non-taxable income and additional deductions		\$	
8. Net income apportioned or allocated outside the District of Columbia (Item 27, col. 1, less item 27, col. 3, page 1)		\$	
9. Interest on certain obligations of the United States, etc. (Item 10, page 1 of Federal return)		\$	
10. Losses from sales or exchanges of assets, other than capital (from Sched. D-1)		\$	
11. Non-taxable dividends (from Schedule E)		\$	
12. Other non-taxable income and additional deductions (itemize)		\$	
(a)		\$	
(b)		\$	
(c)		\$	
13. Total (Lines 7 to 12)		\$	

Schedule B—COST OF GOODS SOLD (See Instruction 10) (Where inventories are an income-determining factor)		Schedule C—COST OF OPERATIONS (Where inventories are not an income-determining factor)	
1. Inventory at beginning of year	\$	1. Salaries and wages	\$
2. Material or merchandise bought for manufacture or sale	\$	2. Other costs (to be detailed):	\$
3. Salaries and wages	\$	(a)	\$
4. Other costs per books (attach itemized sched.)	\$	(b)	\$
5. Total (lines 1 to 4)	\$	(c)	\$
6. Less inventory at end of year	\$	(d)	\$
7. Cost of goods sold (enter as Item 2, page 1)	\$	(e)	\$
		3. Total (enter as Item 5, page 1)	\$

Schedule D-1—GAINS AND LOSSES FROM SALES OR EXCHANGES OF ASSETS OTHER THAN CAPITAL (See Instruction 13)							
1. Description of Property Held for More Than One Year or Less	2. Date Acquired	3. Date Sold or Exchanged	4. Gross Sales Price	5. Cost or Other Basis	6. Expense of Sale and Cost of Improvements (attach schedule to Argument)	7. Depreciation Allowed or Disallowed (attach schedule to Argument)	8. Gain or Loss (column 4 plus 7, minus column 5 and 6)
			\$	\$	\$	\$	\$
Total Net Gain (or Loss) (enter as Item 10, page 1)							\$
* Explain Basis unless cost is used							
State how property was acquired							
State whether at time of sale purchaser was affiliated corporation or stockholder							

Schedule D-2—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS (See Instruction 13)							
1. Description of Property Held for More Than One Year	2. Date Acquired	3. Date Sold or Exchanged	4. Gross Sales Price	5. Cost or Other Basis	6. Expense of Sale and Cost of Improvements (attach schedule to Argument)	7. Depreciation Allowed or Disallowed (attach schedule to Argument)	8. Gain or Loss (column 4 plus 7, minus column 5 and 6)
			\$	\$	\$	\$	\$
Total Net Gain or Loss omitted (under authority of D. C. Income and Franchise Tax Act of 1947, as amended) in the computation of net income							\$
State how property was acquired							
State whether at time of sale purchaser was affiliated corporation or stockholder							
See instruction 13, for even though such assets were held for more than two years they may not be considered "Capital Assets" in certain cases							

Schedule E—INCOME FROM DIVIDENDS (See Instruction 14)		
Name and Address of Paying Organization	1. Taxable	2. Nontaxable
	\$	\$
	\$	\$
	\$	\$
Enter column 1 as Item 11, page 1		
Enter column 2 as Item 11, Schedule A		

Schedule F—COMPENSATION OF OFFICERS						
1. Name	2. Address of Office (Residence)	3. Official Title	4. Percentage of Total Assets of the Corporation	5. Percentage of Capital Stock Owned	6. Preferred	7. Amount of Compensation
Louis Friedland	New York City	President		None	None	\$ 1,000.00
Red Reed	Washington, D. C.	Vice-Pres.		None	None	1,000.00
V. I. Block	Washington, D. C.	Secretary		None	None	1,000.00
Bernard Peterson	Washington, D. C.	Treasurer		None	None	1,000.00
Total compensation of officers (Enter as Item 14, page 1)						\$ 4,000.00

Schedule G—BAD DEBTS (See Instruction 18)							
1. Taxable Year	Amount of Notes and Accounts Receivable Outstanding at		4. Net Income Reported	5. Net Income After	6. Bad Debts Charged (If No Reserve is Carried on Books)	If Corporation Carries a Reserve	
	2. Beginning of Year	3. End of Year				7. Gross Amount Added to Reserve	8. Amount Charged Against Reserve
1954	\$	\$	\$	\$	\$	\$	\$
1955							
1956							
1957							

Check whether deduction claimed represents debts which have become worthless ☐ or so as addition to a reserve ☐

Schedule M.—TAXES (See Instruction 20)			
Name	Amount	Nature	Amount
	\$		\$
Total. (Enter as Item 20, page 1)			\$

Schedule J.—CONTRIBUTIONS OR GIFTS PAID (See Instruction 21)			
Name and Address of Organization	Amount	Name and Address of Organization	Amount
	\$		\$
Total. (Enter as Item 21, page 1, subject to 15 per cent limitation.)			\$

Schedule K.—DEPRECIATION (See Instruction 23)								
1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Cost or Other Basis* (Do not include land or other non-depreciable property)	4. Assets Fully Depreciated in Use at end of Year	5. Depreciation Allowed (or Allowable) in prior Years	6. Remaining Cost or Other Basis to be Recovered	7. Estimated Life Left in Accumulating Depreciation	8. Estimated Remaining Life from Beginning of Year	9. Depreciation Allowable This Year
		\$	\$	\$	\$			\$
Total. (Enter as Item 23, page 1)								\$

*Explain Basis unless cost is used

Schedule L.—OTHER DEDUCTIONS (See Instruction 25)	
	\$
Total. (Enter as Item 25, page 1)	\$

Schedule M.—SALES AND PERSONAL SERVICES SCHEDULE (See Instructions 1 and 2)	
1. All sales of goods made to the United States, the District of Columbia, or others, from stock located in the District (including stock located in a store, warehouse, public warehouse, or consigned stock)	\$
2. All sales of goods shipped into the District of Columbia, to the United States, the District of Columbia or others	\$
3. All sales of goods shipped from stock located outside the District to destinations outside the District, whether made to the United States, the District of Columbia or others, in those cases where the sales were made by, from or through or credited to an office, or other place of business in the District or by, from or through or credited to an office or other place of business of an officer, agent or representative of the taxpayer in the District	\$
4. Charges for work done or services performed in the District	\$
5. Total of Items 1, 2, 3 and 4	\$
6. Amount included in Item 5 as "Computation of District of Columbia Apportionment Factor" below	\$
7. Total amount of all sales of goods called for in Items 1, 2 and 3 which have been omitted from Item 6. (*) (Item 5 minus 6.)	\$

(*) Attach a schedule explaining fully the nature of the sales omitted and state reasons why, in the opinion of the taxpayer, the amount from sales so omitted should not be apportioned to the District. (See Instructions 1 and 2)

COMPUTATION OF DISTRICT OF COLUMBIA APPORTIONMENT FACTOR. (See General Instructions 2)	
A. Total net sales and/or charges for services performed, within and without the District of Columbia (item 1 column 1) and/or (item 4)	\$
B. Total net sales and/or charges for services performed, within the District of Columbia (from Schedule M)	\$
C. District of Columbia apportionment factor. (Item B divided by item A. Partial carried to six (6) decimal places)	

DECLARATION (See Instruction 7)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, each for himself declares under the penalties provided by law that this return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

(Date)

(President or other principal officer) (State title)

(Treasurer, Assistant Treasurer, or Chief Accounting Officer) (State title)

CORPORATE SEAL

DECLARATION

I/we declare under the penalties provided by law that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

(Date)

(Signature of person preparing the return)

(Signature of person preparing the return)

SINOB AND TASH, C.P.A.'s

1738 DE SALES STREET, N. W.
WASHINGTON 6, D. C.

DISTRICT OF COLUMBIA TAX COURT

DOCKET No. 1863

NED BORD and ANNE R. BORD, *Petitioners*

v.

DISTRICT OF COLUMBIA, *Respondent*

STIPULATION

It is hereby stipulated and agreed between the District of Columbia and the above-entitled petitioner, by their respective undersigned attorneys, that the following facts shall be taken as true, provided, however, that this stipulation does not waive the right of either party to introduce other evidence not at variance with the facts herein stipulated, or to object to the introduction in evidence of any such facts on the grounds of immateriality or irrelevancy.

1. Petitioners Ned Bord and Anne R. Bord executed a Consent fixing the expiration of the statutory period for assessment of income taxes for the year 1958. Said petitioners executed the Consent on March 15, 1962 and it was executed on behalf of the District of Columbia on the same date. A copy of said Consent is attached and marked Exhibit 1-A.

2. No further consent respecting the taxable year 1958 was thereafter executed.

3. A letter respecting petitioners' tax liability for the said year was mailed to them by certified mail on September 12, 1962. A copy of said letter is attached hereto and marked Exhibit 2-B.

4. A bill accompanied by a letter of re-computation showing income tax due for the year 1958 was mailed to the petitioners on or about November 21, 1962. A copy of the said bill and letter are attached hereto and marked Exhibits 3-C and 4-D.

5. Petitioners in their District of Columbia income tax return for 1958, deducted an amount of \$86,708.99 from taxable income; said item was captioned "Worthless business loan—Sun Corp.".

6. The files of the United States District Court for the District of Columbia, holding Bankruptcy Court, show that in Bankruptcy action No. 21-59, The Sun Radio Corporation, T/A Sun Radio, was adjudicated a bankrupt, March 17, 1959.

7. The records in the aforesaid bankruptcy action further show that petitioner Ned Bord had filed claims therein in the total amount of \$99,520.95.

8. Under date of November 21, 1960, Richard A. Bishop, the Trustee in the aforesaid action, petitioned the Court to compromise certain claims against Ned Bord and others. A copy of said petition is attached hereto.

9. On December 21, 1960, the Bankruptcy Court approved the aforesaid Compromise.

10. The amount of dividend received by unsecured creditors in the above bankruptcy action was equivalent to approximately 4% of the amounts of their claims.

WERNER STRUPP
Attorney for Petitioners

Attorneys for Respondent

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF GENERAL ADMINISTRATION

FINANCE OFFICE

Revenue Division

Income and Franchise Tax Section

Return No. 1609558 (ERG)

CONSENT FIXING PERIOD OF LIMITATION UPON ASSESSMENT OF
INCOME OR FRANCHISE TAXES

In pursuance of the provisions of the District of Columbia Income Tax Act of 1939, as amended, or the District of Columbia Income and Franchise Tax Act of 1947, as amended, Ned and Anne R. Bord, a taxpayer (or taxpayers)

of 4501 Connecticut Avenue, N. W., Washington 8, D. C. and the Finance Officer, D. C., by his duly authorized representative, hereby consent and agree as follows:

That the amount of any income or franchise taxes due under any return (or returns) made by or on behalf of the above-named taxpayer (or taxpayers) for the taxable year (or years) ended December 31, 1958 under the existing law, may be assessed at any time on or before October 15, 1962 except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered or certified mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Finance Officer, D. C., is prohibited from making an assessment and for sixty days thereafter.

ANNE R. BORD (SEAL)
Taxpayer

Date 3/15/62

NED BORD (SEAL)
Taxpayer

Date 3/15/62

KENNETH BACK,
Finance Officer, D. C.

By ALLISON W. SHELL
Supervisor,
Revenue Division

Date 3/15/62

FR-137 (Rev. 3-62)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF GENERAL ADMINISTRATION

September 12, 1962

Finance Office:
Revenue Division
Certified Mail
Return Receipt Requested

Ned and Anne Bord
4501 Connecticut Avenue, N. W.
Washington 8, D. C.

Re: No. 1609558(ERG)

Dear Sir and Madam:

The examination by this office of your Individual Income Tax return(s) for the year(s) ended December 31, 1958, indicates that the adjustment of your tax liability, as shown in the accompanying Report(s) of D. C. Individual Income Tax Audit Changes, is warranted.

IF YOU AGREE to the adjustment(s), as shown in the report(s), the enclosed form of waiver should be executed and forwarded to this office promptly. Action will then be taken as indicated on line 13 or 14 of the report(s), whichever is applicable.

IF YOU DO NOT AGREE to the adjustment(s), you may file a protest with this office, within thirty (30) days from the date of this letter, stating the grounds for your exceptions. Careful consideration will be given to such protest and, if you so request, an opportunity for a hearing in this office will be granted to you prior to final determination.

Should you fail to file either the enclosed waiver form or a written protest with this office within the thirty (30)

day period, final determination of your tax liability will be made in accordance with the enclosed report(s).

Yours very truly,

ALLISON W. SHELL
Allison W. Shell
Supervisory Tax Auditor
Income and Franchise
Tax Section

Enclosures:

Waiver Form
Statement(s)

FR-181 (Rev. 8-61)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
REPORT OF D.C. INDIVIDUAL INCOME TAX AUDIT CHANGES

Finance Office
Revenue Division

Name and Address of Taxpayer(s) Ned & Anne Bord,
4501 Conn. Ave. N.W., Washington 8, D. C.

Return Number 1609558.

Date of Report 9-6-1962.

Year Ended 12-31-1958.

Tax Auditor E. R. Guilford.

1. Taxable income shown on re- turn or as previously adjusted	\$(72,637.90)
2. Add: Additional income or unallowable deductions:	
Loss of worthless business loan disallowed	\$ 86,708.99
Liquidating dividend	189,730.88
	<u>276,439.87</u>
3. Total of lines 1 and 2	\$203,801.97

4. LESS: Decrease in income or additional deductions:	\$.....	
5. Revised taxable income		\$203,801.97
6. Revised tax liability		\$ 9,815.10
7. LESS: Total tax shown on re- turn or as previously adjusted		<u>—0—</u>
8. Deficiency in tax		\$ 9,815.10
9. ADD: Penalty, if any 5% negligence		<u>490.76</u>
10. Total of lines 8 and 9		10,305.86

Computation of Corrected Balance Due or of
Net Overpayment

11. Revised tax liability and penalty, if any (total of lines 6 and 9		\$ 10,305.86
12. LESS: Total tax paid		
A. Tax withheld	\$ 6.36	
B. Payments on estimated tax ..	10.00	
C. With return		
D. Sum of items A through C ..	16.36	
E. Deduct previous refunds and/or credits	16.36	<u>—0—</u>
13. Balance due (Line 11 less line 12)		\$ 10,305.86
Upon receipt of signed waiver, a bill will be mailed to you for this amount with in- terest thereon as provided by Law.		
14. Net overpayment (Line 12 less line 11) ..	\$	
Upon receipt of signed waiver, a refund will be authorized for this amount.		

See other side for explanation of adjustments

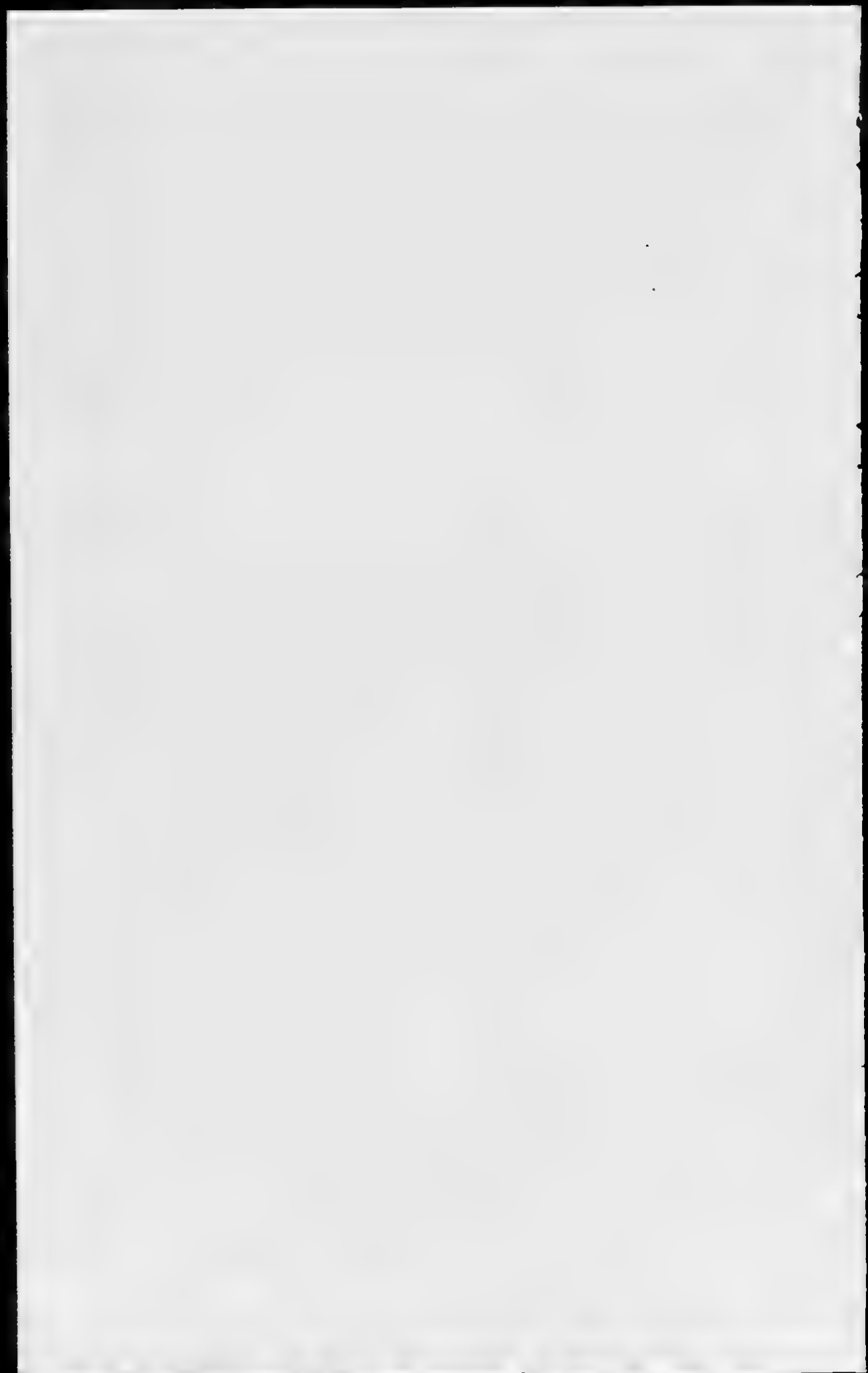
1. Sun Corporation worthless business loan disallowed \$86,708.99. It would appear that this loss is not allowable in 1958 since the taxpayer made claims as a preferred creditor against the corporation in 1959.

2. Liquidating dividend received from Sedgwick Gardens, Inc. is computed as follows:

Total amount received at liquidation	\$207,730.88
Less: Par value of stock	18,000.00
	<hr/>
Liquidating dividend	\$189,730.88
	<hr/>

3. 5% negligence penalty 490.76

The negligence penalty has been added, since the taxpayer failed to report the liquidation of Sedgwick Gardens, Inc. and the income received therefrom (Title XIII, Section 3).



INCOME AND FRANCHISE TAX
EX 11/11/1 3-23

FINANCE OFFICE • Revenue Division

1 - Individual Income 2 - Partnership Income 3 - Corporation 4 - Unincorporated Business 5 - Fiduciary 6 - Employee Withholding		ACCOUNT NUMBER 1609558	TAX YEAR 1958	DATE 11/21/62	PAYMENT DUE	
NAME AND ADDRESS BORD, N & A 4501 CONN. AVE NW WASHINGTON 8 D C		BUS. TAX 1	TOTAL TAX DOLLARS CTS 9,623 26 481 16 2,222 97	CREDIT DOLLARS CTS PEN INT.	INTEREST TO 12/15/62	DOLLARS CTS 12,327 39
Interest on payment due at the rate of 1/4 of 1% per month or portion thereof must be added if not paid on or before the interest date shown on this bill. Late filing penalty is computed at 5% per month or portion thereof (maximum 25%), except type 1a E which is a flat 25%. Make check payable to D. C. TREASURER. Send check or money order to FINANCE OFFICE, REVENUE DIVISION, Municipal Center, Washington, D. C.		Interest at rate of 1/4 of 1% per month or portion thereof from 12/15/62 to 2/15/63		TOTAL PAYMENT DUE →		DOLLARS CTS 12,423 62

RETURN THIS NOTICE WITH PAYMENT

Your cancelled check is your receipt.

FD-36 (5-60)

STATEMENT



Exhibit 4-D

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF GENERAL ADMINISTRATION

November 21, 1962

Ned and Anne R. Bord
4501 Connecticut Avenue, N. W., #616
Washington 8, D. C.

Re: 1609558(58)(ERG)

Our proposed deficiency in income tax against you for the taxable year 1958 has been recomputed as follows:

Taxable income per our notice of 9/12/62	\$203,801.97
Less: Contributions not claimed on return, allowed	3,816.69

Taxable income, as corrected	\$199,985.28
Revised tax liability	\$ 9,623.26
Add: 5% negligence penalty	481.16

Revised deficiency and penalty	10,104.42
--------------------------------	-----------

This adjustment in your taxable income is the result of information submitted in a letter dated October 10, 1962, from your accountant, Mr. Oliver Riggs.

A bill for the revised deficiency in tax, penalty and statutory interest is enclosed for prompt payment.

Very truly yours,

BEN A. BARSKY

Ben A. Barsky

Supervisory Tax Auditor

Income and Franchise Tax

Section

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding Bankruptcy Court

Bankruptcy No. 21-59

In the matter of

THE SUN RADIO CORPORATION
t/a SUN RADIO

Bankrupt

ORDER AUTHORIZING COMPROMISE OF CONTROVERSY

The petition of RICHARD A. BISHOP, trustee of the estate of the above-named bankrupt, filed herein, for authority to compromise a certain controversy, having come on for hearing before me, of which hearing at least ten days notice by mail was given to the creditors herein.

Now, after due hearing and it appearing that there has been no objection filed herein, nor has anyone appeared in opposition thereto, and it further appearing that it is proper and for the best interests of this estate, it is,

ORDERED, that the said trustee be, and he hereby is authorized to compromise his controversy with NED BORD, SAM GILDAR and OSCAR FELKER, by accepting the sum of \$15,000.00 payable in the following installments:

\$5,000.00 on January 2, 1961
4,000.00 on February 1, 1961
3,000.00 on March 1, 1961
3,000.00 on March 31, 1961

and it is further,

ORDERED, that the claim filed herein by NED BORD and SAM GILDAR in the amounts of \$99,520.95 and \$34,521.00 respectively be and they are hereby expunged and it is further,

ORDERED, that NED BORD, SAM GILDAR and OSCAR FELKER be and they are hereby directed to obtain from the National Bank of Washington a release of the claim of the said National Bank of Washington filed in these proceedings in the sum of \$33,000.00.

Dated the 21st day of December 1960.

/s/ JOHN A. BRESNAHAN
Referee in Bankruptcy

Presented by:

/s/ NATHAN M. BROWN
Nathan M. Brown
Attorney for Trustee

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding Bankruptcy Court

Bankruptcy No. 21-59

In the matter of

THE SUN RADIO CORPORATION
t/s SUN RADIO

Bankrupt

PETITION FOR AUTHORITY TO COMPROMISE CONTROVERSY

To:

Honorable John A. Bresnahan
Referee in Bankruptcy

The petition of RICHARD A. BISHOP, Trustee in Bankruptcy, respectfully represents:

1. That on or about May 5, 1959, the petitioner was duly appointed trustee in the above-entitled estate, has qualified, and is presently so acting.

2. That pursuant to an order of this Court, your petitioner engaged the services of NATHAN M. BROWN as his counsel for the purpose, among other things, of investigating into preferential payments and to take action to recover assets wrongfully diverted from the corporation.

3. That your petitioner is informed and believes that NATHAN M. BROWN his counsel in this case, investigated into the books and records and affairs of the corporation, following which he entered into the negotiations for the purpose of attempting to compromise the claim of your trustee against the officers and directors of the corporation for recovery of the preferential payments, and to recover damages for wrongful diversion of funds of the corporation.

4. That as a result of the negotiations between your petitioner's attorney and the attorney representing the three principal officers and directors, namely: SAM GILDAR, NED BORD, and OSCAR FELKER, your petitioner has received, through his counsel, an offer to settle any and all claims of the trustee against the above-named individuals for the following consideration.

(a) Mr. NED BORD will withdraw and release his claim in this bankruptcy proceeding as filed in the amount of \$99,520.95.

(b) Mr. SAM GILDAR will release his claim in this bankruptcy proceeding as filed in the sum of \$34,521.00.

(c) The aforesaid officers and directors will cause the National Bank of Washington to withdraw and release its claim as filed in this proceeding in the sum of \$33,000.00.

5. In addition, Messrs, BORD, GILDAR and FELKER will pay to your trustee a total sum of \$15,000.00 in cash, payable in the following instalments:

\$5,000.00 on January 2, 1961
\$4,000.00 on February 1, 1961
\$3,000.00 on March 1, 1961
\$3,000.00 on March 31, 1961

6. Your trustee is informed by his attorney and represents to the Court that the offer made by the above-named principals is fair and equitable and in the best interest of this estate.

7. Your petitioner further represents that your trustee has a claim against BERNARD SEMEL, but is informed and believes that any recovery against him would be uncollectible and any expenditure of moneys to enforce the claim would result in a waste of costs.

8. The nature of your petitioner's claim against the individual officers is for misfeasance and nonfeasance and would involve extensive litigation at a heavy cost to the estate with no assurance of ultimate success.

9. Your petitioner further represents that a committee of creditors has been appointed herein consisting of GORDON TURNER, SAM GOODMAN and HARRY BEACH, and no creditor has filed with this Court a demand that notices relating to the proposed compromise of any controversy be sent to him.

10. Your petitioner further represents that under § 58 (11 U.S.C. § 94) of the Bankruptcy Act, it is provided that where a creditors' committee has been appointed, the notices required of the proposed compromise of any controversy shall be sent only to such committee and to the creditors who have filed with the Court a demand that all notices under this provision be sent to them.

WHEREFORE, your petitioner prays that he be authorized to compromise the controversy as set forth herein by the acceptance in full satisfaction of your petitioner's claim, the sum of \$15,000.00 and the withdrawal of the aforesaid claims of the officers as set forth herein; that notices of this proposed compromise be sent to the creditors' committee, GORDON TURNER, SAM GOODMAN, and HARRY BEACH; that a day be fixed by this Court to hear any objections

to the proposed compromise; and for such other and further relief as to the Court may seem just.

/s/ RICHARD A. BISHOP
Trustee in Bankruptcy

/s/ NATHAN M. BROWN
Nathan M. Brown
Attorney for Trustee

DISTRICT OF COLUMBIA, SS:

RICHARD A. BISHOP, Trustee in Bankruptcy, upon oath, deposes and says that he has read the foregoing and annexed petition, by him subscribed, and knows the contents thereof; that the matters and things alleged therein are true to the best of his knowledge, information and belief.

/s/ RICHARD A. BISHOP

SUBSCRIBED AND SWORN to before me this 18th day of November 1960.

/s/HAZEL JANE DAVIES
Notary Public, D. C.

My commission expires June 30, 1965.

February 23, 1958.

Columbia Title Insurance Company
Woodward Building
15th and H Sts., N. W.
Washington, D. C.

Gentlemen:

Reference is made to the settlement being held this day in your Office involving the sale of Lot Thirty-one (31) in Square 2060 with the improvements thereon known as Sedgwick Gardens Apartments, Washington, D. C.

You are hereby instructed to disburse the proceeds of the sale to the following-named persons who are liquidating

stockholders of Sedgwick Gardens, Inc., in the proportions set beside their names:

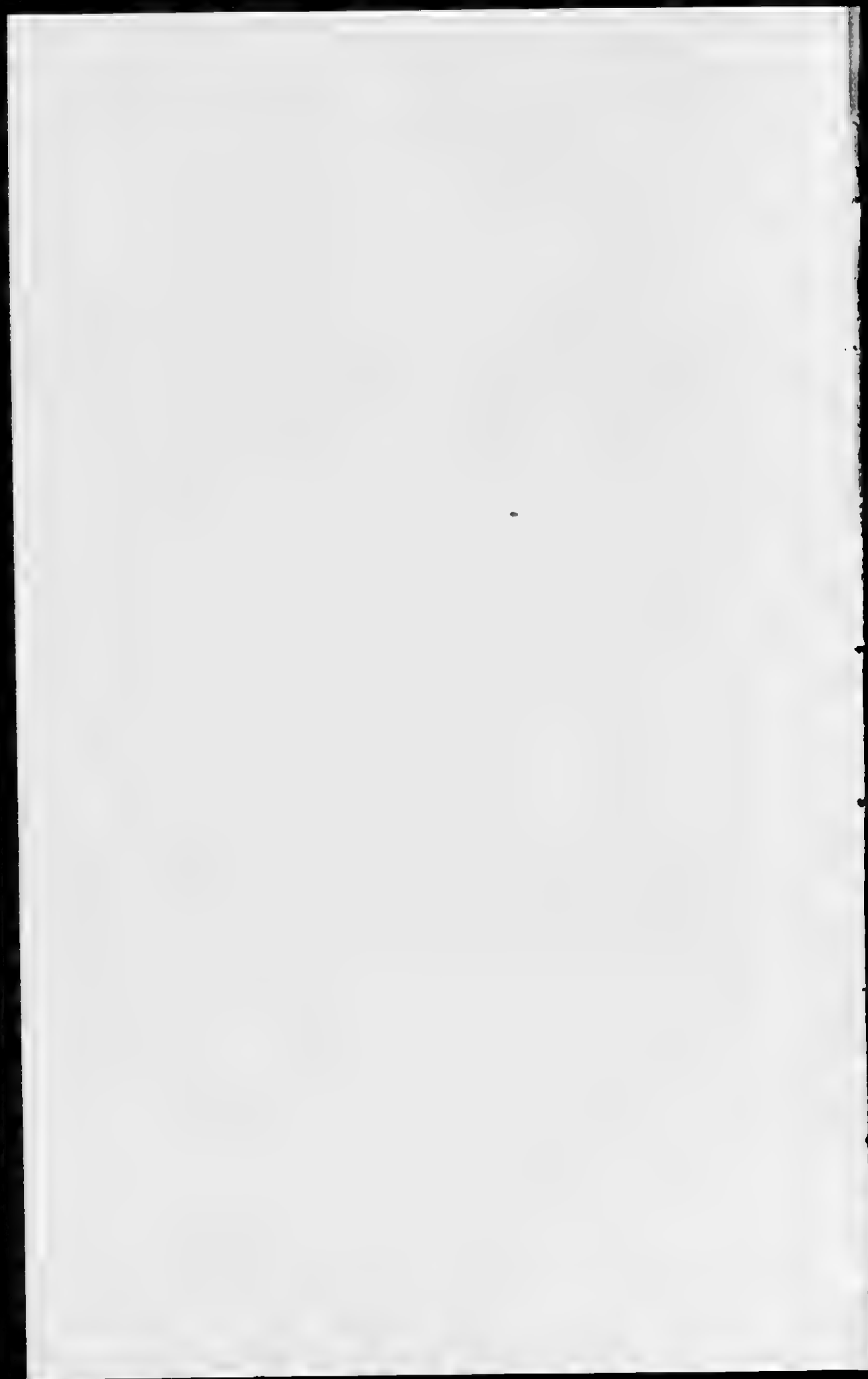
Lily Friedland	1/4th
Anne R. Bord	1/4th
Ellis P. Block, Trustee of Ellis P. Block Trust	1/4th
Harry D. Goldstein and Philip Goldstein, as Trustees under the Will of Samuel Goldberg, deceased	1/4th

We hereby certify to you that Sedgwick Gardens, Inc. has no obligations other than the first deed of trust, if any, against the above property and further, except for current operating expenses of said property, funds for the payment of which are currently in the hands of Randall H. Hagner & Company, with instructions to use said funds for the payment of said current operating expenses.

Very truly yours,

SEDGWICK GARDENS, INC.

By NED BORD
Ned Bord
Vice-President



FORM D-40
GOVERNMENT OF
THE DISTRICT OF
COLUMBIA

DISTRICT OF COLUMBIA
Individual Income Tax Return

1958

For Calendar Year or Fiscal Year began _____, 1958 and ended _____, 1958

PLEASE TYPE OR PRINT PLAINLY

Name MRD & ANNE R. BORD
(If this is a joint return of husband and wife, use first names of both)

Home address 4501 Connecticut Avenue, N.W., Apt. # 616,
(Number and street)

Washington 8, D.C.
(City or post office) (State) (County)

OCCUPATION
YOURS Salesman, etc.
WIFE'S _____

SOCIAL SECURITY NO.
YOURS 578-03-6283
WIFE'S _____

If Income Was All From Salaries, Wages, Dividends and Interest, Use Pages 1 and 2 Only. See Instructions for Page 1.

1. Personal Exemptions. Check the applicable block(s). (If you check block A, B or C, do not check block D.)

A. ☒ \$2,000 husband and wife. Enter full name of spouse ANNE R. BORD \$2,000.00

B. ☐ \$1,000 single, or married and not living with husband or wife _____

C. ☐ \$1,000 married and living with husband or wife and filing separately _____

D. ☐ \$1,500 head of family (check ONLY if you maintained in one household one or more of the dependents listed below) _____

E. 1. 65 or over at end of taxable year ☐ Yourself ☐ Wife (\$500 each) _____

2. Blind at end of taxable year ☐ Yourself ☐ Wife (\$500 each) _____

F. Total number of dependents claimed below _____ List names and relationship. (Do not list spouse)

1. _____ 7. _____

2. _____ 8. _____

3. _____ 9. _____ Total Credit \$500 for each _____

G. Enter the total amount of exemptions and credits claimed in A to F above \$2,000.00

2. Enter all wages, salaries, bonuses, commissions, tips, and other compensation received in 1958, before payroll deductions.

Employer's Name	Address Where Employed (City and State)	Wages, etc.	D. C. Income Tax Withheld
<u>Sedgwick Gardens, Inc.</u>	<u>Washington, D.C.</u>	<u>\$ 6,227.70</u>	<u>\$ 16.36</u>
<u>Schedule Dividends Received</u>	<u>\$ 2,069.40</u>		
<u>Schedule Interest Income</u>	<u>4,066.87</u>		
<u>Dividend-Queenstown Corp.</u>	<u>4,335.24</u>		
3. Enter the total amount of your dividends and interest. Submit Itemized list <u>\$ 10,471.51</u>			
4. Enter the total other income (or loss) from page 3 <u>\$ 1,974.68</u>			
5. Enter total business income (or loss) from page 4 <u>\$ 23,086.39</u>			
6. ADJUSTED GROSS INCOME (sum of items 2, 3, 4 and 5) <u>\$ 37,854.70</u>			

You may use the TAX TABLE (See Instr.) if your adjusted gross income (Item 6) is \$5,000 or less, and you are not itemizing your deductions on page 2.

7. Enter tax from the Tax Table, or from line 6, page 2. Please check if you use Tax Table ☐ \$ 6.26

8. (a) Total D. C. income tax withheld as shown in Item 3 above \$ 16.36

(b) Total payments on 1958 declaration of estimated tax _____

9. If your tax (Item 7) is larger than your payments (Item 8), enter the balance due here \$ 6.26

PAY IN FULL WITH THIS RETURN. See mailing instructions below.

10. If your payments (Item 8) are larger than your tax (Item 7) enter the overpayment here \$ 16.36

If less than \$5.00 it will be refunded only upon application. See instructions.
(This overpayment may not be credited on 1959 estimated tax.)

IMPORTANT: A through D immediately following must be completed.

- A. Check if you moved into ☐ or out of ☐ the District of Columbia in 1958. Date you moved _____
- B. Is your wife (or husband) filing a separate return for 1958? No. If "yes," enter her (or his) name and amount of personal exemption claimed on her (or his) return _____
- C. Did you file a return with the District of Columbia for the year 1957? Yes. If not, state reason _____
- D. Has the Internal Revenue Service, in the past 3 years, made any adjustment in the Federal returns as originally filed by you? Yes () No (X) If so, attach a detailed statement explaining such adjustments unless previously submitted.

I declare under the penalties provided by law that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct and complete return.

(Individual or First Signature of person preparing return) SIMON & TASH, C.P.A.'s. 4/10/58
CITY - 6.

(Signature of taxpayer) _____
(If this is a joint return, signature of wife) _____

Mailing Instructions: Make check or money order payable to the D. C. Treasurer for amount in Item 9 above. Mail this return and remittance to the FINANCE OFFICE, Revenue Division, Municipal Center, Washington 1, D. C. on or before April 15, 1959.

ATTACH PAYMENT AND COPY "A" OF ALL FORMS D-1 HERE
↓
EXEMPTIONS
↓
INCOME
↓
TAX
↓
PAY IN FULL OR REFUND

ITEMIZED DEDUCTIONS—IF YOU DO NOT USE TAX TABLE OR STANDARD DEDUCTION

If Husband and Wife (Not Legally Separated) File Separate Returns and One Itemizes Deductions, the Other Must Also Itemize. Deductions and taxes to whom paid. If more space is needed, attach additional sheets. Please put your name and address on any attachments.

Contributions			
	Total Contributions (not to exceed 15 percent of Item 6, page 1)		\$
Interest			
	Total		\$
Taxes			
	Total		\$
Medical and dental expenses			\$
	Net Expenses (not compensated by insurance or otherwise)		\$
	Enter 5 percent of item 6, page 1, and subtract from Net Expenses		
	Allowable Medical and Dental Expenses. NOT TO EXCEED \$2,500 for husband and wife filing jointly \$1,250 for all others		
Losses from fire, storm, or other casualty, or theft			
	Total losses of property held for less than two years (not compensated by insurance or otherwise)		\$
Miscellaneous			
	Total		\$
TOTAL DEDUCTIONS (Enter on line 2 of Tax Computation below)			\$

TAX COMPUTATION—IF YOU DO NOT USE THE TAX TABLE

1. Enter Adjusted Gross Income from Item 6, page 1	\$	
2. If deductions are itemized above, enter total of such deductions. If deductions are not itemized and line 1 above is \$4,000 or more, married persons filing separately enter \$2,000. All others enter 1/2 percent of line 1, or \$1,000, whichever is smaller	\$	
3. Balance (line 1 less line 2)	\$	
4. Enter TOTAL EXEMPTIONS AND CREDITS claimed in Item 1, page 1	\$	
5. TAXABLE INCOME (line 3 less line 4)	\$	
6. Tax on amount on line 5. Use Tax Rate Schedule on bottom of page 3	\$	
7. Allowable income and/or intangible tax paid to State of domicile (See Specific Instructions for page 3)	\$	
8. Net Tax (line 6 less line 7) Enter here and in Item 7, page 1	\$	

NONTAXABLE INCOME—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS.—(See Instructions)

1. Description of property	2. Date acquired Mo. Day Year	3. Date sold or exchanged Mo. Day Year	4. Gross sales price	5. Depreciation allowed (or allowable) from acquisition (attach details)	6. Cost or other basis	7. Expenses of sale and cost of improvement (attach subsequent acquisition to computation)	8. Gain or loss (attach line 4 plus details 5 before the cost of returns 6 and 7)
			\$	\$	\$	\$	\$
			\$	\$	\$	\$	\$
			\$	\$	\$	\$	\$

OTHER NONTAXABLE INCOME. (See Instructions)

1. Nature of income	2. Amount	3. Nature of income	4. Amount
	\$		\$
	\$		\$
	\$		\$

Mr. 5104
COPY 25 100

NEED ROAD, 4501 Connecticut Avenue, N.W., Apt. # 616,
Washington 8, D.C.

YEAR: 1958.

DIVIDENDS RECEIVED:

First National Bank of Arlington	\$	54.00	
Wiggs National Bank		90.00	
Community Drug Co. - Drug Fair		175.00	
Koshring Co.		168.30	
Bethlehem Steel Co.		240.00	
Pepsi Cola (Long Island)		80.00	
American Security & Trust Co. (Jointly owned)		714.60	
American Marietta		225.00	
Murphy Trust Co. (Jointly owned)		50.00	
WELBILT CORPORATION		112.50	
Total Dividends Received	\$	2,069.40	
<u>INTEREST INCOME:</u>			
Hillside Manor, Inc.	\$	1,689.60	
Randall H. Hagner & Co., (York Asso.)		120.82	
M. A. W., Inc.		1,029.15	
National Bank of Washington		145.71	
Perpetual S/A		495.40	
Fidelity Investment Co. (Timothy Park)		90.00	
Israel Bonds		125.25	
Ampel Bonds		75.94	
Israel Development Corp. Debentures		257.00	
Total Interest Received	\$	4,058.87	

No 3106
COPY OF 3106

Wes. Bond
4501 Connecticut Ave., N.W.,
Washington 8, D.C.

Schedule 'C' Form 1040
Year 1957

Income:

Commissions

\$ 38850.00

Director's Fees

400.00

Total Income

\$ 35268.00

Expenses:

Auto - New

\$ 3580.00

" - Oil, Grease, Wash, etc.

99.00

" - Parking

2400.00

" - Freight Insurance

2365.20

" - Depreciation (4 months)

2333.33

" - Sales Tax

7588.25

Sub-Total

\$ 19163.58

Sigs: 1/2 for personal use

27396.58

\$ 16472.59

Interest Paid: National Bk. of Washington

4444.94

Walter Trenchard Corp

55.00

Fred Schneider

1863.65

W. H. Carroll & Co.

3625.50

American Rent Trust Co.

777.55

National Bank

2337.25

Washington Trust Co.

22.50

Office Expenses & Callers

11716.00

Travel & Entertainment Expenses

3055.00

Dues & Subscriptions

2910.00

Promotion Expenses

2419.55

Worthless Premium Loan - New York

5670.599

" " " - Long Term Bond

6160.00

Smith-Craig Wall & 1 - Expenses

3321.88

1/2 of Auto Repairs

5176.25

Total Expenses

114536.00

NET LOSS

\$ (79277.20)

Ted Bord, 4501 Conn. Ave. N.W. Washington 8, D.C.		Year: 1958	728	12
Schedule of Partnership Income:				
Faynor, Bord & Rubins	Virginia	\$	738.58	
Leitch, Inc.	Massachusetts		46,740.	
Haddon Trust Venture.		(398.88	
Chilton, Inc. Chetel.	"		249,374.	
Wilkins Venture.	"	(12.07	
25% Profit Property (final)	D.C.	(78.09	
55-58-59-60 Conn. Ave. NW	"		2,970.3	
Overington Association	"	(189,664.	
Sam F. Sambo & Ted Bord	"		22.86	
Sam F. Sambo, et al.	"		115,425	
Total from Partnership Income:			\$	907,543.
Schedule of Unincorporated Business Income:				
Paulward Contract Co.		\$	175,000.	
1825 Association			115,005.	
Thurston & Board & Ted Bord		(8,000.	
Ted Bord, et al. (final)			NONE	
Total from Unincorporated Business:			\$	155,402.

IF INCOME WAS ALL FROM SALARIES, WAGES, DIVIDENDS AND INTEREST, TEAR OFF THIS PAGE AND FILE ONLY
PAGES 1 AND 2.

**Schedule A—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY
OTHER THAN CAPITAL ASSETS. (See Instructions for Schedule A)**

[illegible]**Total net gain (or loss)**

Schedule E—INCOME FROM ANNUITIES OR PENSIONS

SECTION 8 - HOW MONIES ARE PAID TO BENEFICIARIES					
1. Cost of annuity (total amount paid)	2. Amount received before tax prior year	3. Remainder of your cost (column 1 less column 2)	4. Total amount received this year	5. Excess, if any, of column 4 over column 3	6. Enter column 5, or 7% of column 3, whichever is greater.
\$.....	\$.....	\$.....	\$.....	\$.....	\$.....
-----	-----	-----	-----	-----	-----
-----	-----	-----	-----	-----	-----
-----	-----	-----	-----	-----	-----
-----	-----	-----	-----	-----	-----
-----	-----	-----	-----	-----	-----
Total of column 6					

Total of column 6

Schedule C—INCOME FROM RENTS AND ROYALTIES

[illegible]

1. Totals

2. Net profit (or loss) (column 2 less sum of columns 3, 4, and 5)

Schedule D—INCOME FROM PARTNERSHIPS, ESTATES, TRUSTS, AND OTHER SOURCES

1. Partnership (Name and address) See Schedule A attached 2075-43
2. Estate or trust (Name and address) _____
3. Other sources (state nature) _____

3. ~~Other source - (if any) - nature~~

Total income (or loss) from above sources (enter here and in item 4, page 1)

Schedule E-EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULE C

[illegible]

1999 TAX RATES

From the following table determine tax on the taxable income.

From the following table figure your tax on the taxable income on line 5, page 2 of the return:

If the taxable income is:		The tax is:	
Not over \$5,000		4% of taxable income	
Over \$5,000 but not over \$10,000		\$125 plus 3% of excess over \$5,000	
Over \$10,000 but not over \$15,000		\$375 plus 3% of excess over \$10,000	
Over \$15,000 but not over \$20,000		\$450 plus 4% of excess over \$15,000	
Over \$20,000 but not over \$25,000		\$650 plus 4% of excess over \$20,000	
Over \$25,000		\$875 plus 5% of excess over \$25,000	

Example:	
If the taxable income is \$36,400.00	
Tax on First	\$ 3,000.00 @ 4% = \$125.00
Tax on Second	5,000.00 @ 3% = 150.00
Tax on Third	5,000.00 @ 3% = 175.00
Tax on Fourth	5,000.00 @ 4% = 200.00
Tax on Fifth	5,000.00 @ 4% = 225.00
Tax on amount over \$25,000	1,400.00 @ 5% = 70.00
\$24,250.00 Total Tax	

IF INCOME WAS ALL FROM SALARIES, WAGES, DIVIDENDS AND INTEREST, TEAR OFF THIS PAGE AND FILE ONLY
PAGES 1 and 2.

Schedule F—INCOME (OR LOSS) FROM UNINCORPORATED BUSINESS

As owner or part owner of an unincorporated business, you are required to include in this schedule that part of your share of the income (or loss) of such business for its entire taxable year ended in 1934 which was not taxable by the District at 5% to the unincorporated business.

Print below name(s) and address(es) of the Unincorporated Business(es)

1. Red Bird, Washington, D.C.

2. See Schedule Attached

3.

4.

Total Net Income
for each business
shown in column
C, Form D-99
(3,262.21)
(1,574.02)

Add lines 1 through 4, and enter the total here

(3,262.21)

Schedule G—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION

In column this schedule if you Unincorporated Business Property tax return is required to be filed on Form D-99

Business Name Red Bird

nature of business Auto

Address

IMPORTANT—If you had more than one business, a separate Schedule G must be completed for each business.

Line 1. Total receipts \$ _____, less allowances, rebates, and returns \$ _____

2. Inventory at beginning of year \$ _____

3. Merchandise purchased \$ _____, less any items withdrawn from business for personal use \$ _____

4. Cost of labor (do not include salary paid to yourself) \$ _____

5. Material and supplies \$ _____

6. Other costs (explain in Schedule G-1) \$ _____

7. Total of lines 2 through 6 \$ _____

8. Inventory at end of year \$ _____

9. Cost of goods sold (line 7 less line 8) \$ _____

10. Gross profit (line 1 less line 9) \$ _____

OTHER BUSINESS DEDUCTIONS

11. Salaries and wages not included on line 4 (do not include any paid to yourself) \$ _____

12. Rent on business property \$ _____

13. Interest on business indebtedness \$ _____

14. Taxes on business and business property \$ _____

15. Losses of business property (attach statement) \$ _____

16. Bad debts arising from sales or services \$ _____

17. Depreciation and obsolescence (explain in Schedule G-1) \$ _____

18. Repairs (explain in Schedule G-1) \$ _____

19. Depletion of mines, oil and gas wells, timber, etc. (attach schedule) \$ _____

20. Amortization of emergency and grain storage facilities (attach statement) \$ _____

21. Other business expenses (explain in Schedule G-1) \$ _____

22. Total of lines 11 through 21 \$ _____

23. Enter here net profit (or loss) (line 10 less line 22) See Schedule Attached

(29,177.21)
(33,016.89)

Total BUSINESS income (or loss) from above sources (Enter here and in item 5, page 1)

Schedule G-1. EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED ON LINE 17

1. Kind of property (if building, state material of which constructed). Exclude land and other nondepreciable property	2. Date acquired	3. Cost or other basis	4. Depreciation allowed (or allowable) in prior years	5. Method of computing depreciation	6. Rate (%) or life (years)	7. Depreciation for this year
		\$	\$			\$

Schedule G-2. EXPLANATION OF LINES 6, 14, and 21

Line No.	Description	Amount	Line No.	Description	Amount
		\$			\$

REAL ESTATE

1321 Connecticut Avenue, N. W.
Washington 6, D. C.

Date March 26 1958

Building 3726 Conn Avenue N W

IN ACCOUNT WITH SEDGWICK GARDENS INCORPORATED

January Current Rental	\$12149 50	
Employees Allowance—Feb 16-28	61 75	
	<hr/>	
February Current Rental	\$12211 25	
Garages	500 00	
Previous Unpaid Rent	155 00	
	<hr/>	\$12866 25
Less		
Previously Paid	48 00	
Apt 413—Vacant	110 00	
	<hr/>	158 00
		<hr/>
		\$12708 25
Miscellaneous Collection		125 15
		<hr/>
Total Collections		\$12833 40
Disbursements		10044 97
		<hr/>
Transferred to Reserve Account		<u>\$ 2788 43</u>

THE SUN CORPORATION
BALANCE SHEET
SEPTEMBER 30, 1958

ASSETS				
CURRENT				
Cash on Hand			\$ 500.00	
Cash in Banks			(2,315.21)	
Accounts Receivable—Trade			27,549.99	
Accounts Receivable—Other			19,346.40	
Inventory			181,364.13	
Post Dated Checks and Returned Checks			278.38	
Advances to Employees			3,649.54	
Total Current Assets				\$230,373.23
PREPAID—Prepaid Insurance				7,525.83
FIXED				
	Cost	Depreciation Reserve 1/31/58	Net	
Leasehold Improvements	\$31,976.68	\$ 4,337.72	\$27,638.96	
Fixtures and Equipment	38,893.62	11,705.46	27,188.16	
Total	\$70,870.30	\$16,043.18		
Net Value of Fixed Assets				54,827.12
OTHER				
Deposit—Utility			\$ 100.00	
Organization Expense			1,315.88	
Other Total Assets				1,415.88
TOTAL ASSETS				<u>\$294,142.06</u>
LIABILITIES AND NET WORTH				
CURRENT				
Accounts Payable—Trade			\$215,034.43	
Accounts Payable—Others			23,156.09	
Accrued Salaries			2,436.15	
Accrued Taxes			990.57	
Accrued Payroll Taxes			1,577.46	
Accrued Sales and Excise Taxes			2,128.07	
Exchange (Consigned Merchandise)			5,898.42	
Note Payable—Sun Radio & Supply Corp. (Due within One Yr.)			29,522.00	
Note Payable—Liberty Nat'l Bank (Due Within One Year)			30,000.00	
Total Current Liabilities				\$310,743.19
DEFERRED				
Note Payable—Liberty Nat'l Bank (Due Beyond One Year)			\$ 13,000.00	
Note Payable—Officers			77,649.21	
Total Deferred Liabilities				90,649.21
TOTAL LIABILITIES				<u>\$401,392.40</u>
NET WORTH				
Capital Stock			\$ 58,174.53	
Surplus			(165,424.87)	
TOTAL NET WORTH				<u>(107,250.34)</u>
TOTAL LIABILITIES AND NET WORTH				<u>\$294,142.06</u>

RECORDER OF DEEDS
WASHINGTON

THIS IS TO CERTIFY *that the pages attached hereto constitute a full, true, and complete copy of*

A DEED BY AND BETWEEN SEDGWICK GARDENS INC., GRANTOR, AND 3726 CONNECTICUT AVE., INC., GRANTED, DATED THE 28TH DAY OF FEBRUARY, 1958, AND RECORDED ON THE 3RD DAY OF MARCH, 1958, AT 2:41 P.M., IN LIBER No. 11003, FOLIO 515.

as the same appears of record in this office

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of this office to be affixed, this the 8th day of May A. D. 1963.

(SEAL)

PETER S. RIDLEY,
Recorder of Deeds, D. C.

By ELEANORE DAGUE WILLIAMS
Deputy Recorder of Deeds, D. C.

TO HAVE AND TO HOLD, the said land and premises, with the improvements, easements and appurtenances, unto and to the use of the said party hereto of the second part, in fee simple.

AND the said SEDGWICK GARDENS INC. does hereby covenant to warrant specially the property hereby conveyed, and to execute such further assurances of said land as may be requisite.

IN TESTIMONY WHEREOF, on the day and year first hereinabove written, the said SEDGWICK GARDENS INC. has caused these presents to be signed with its Corporate name by Ned Bord its Vice President, attested by Victor I. Block its Secretary and its Corporate Seal to be hereunto affixed, and does hereby constitute and appoint Ned Bord its true and lawful Attorney in fact for it and in its name to appear before any officer authorized by law to take and

certify acknowledgments of conveyances of land in the District of Columbia, and then and there to acknowledge and deliver these presents as its act and deed.

(SEAL)

SEDGWICK GARDENS INC.

By: NED BORD

Vice-President

Attest:

VICTOR I. BLOCK

Secretary

THIS IS TO CERTIFY that the foregoing and annexed Deed was executed and delivered pursuant to Resolutions adopted by the Stockholders and Board of Directors of SEDGWICK GARDENS INC.

VICTOR I. BLOCK

Secretary

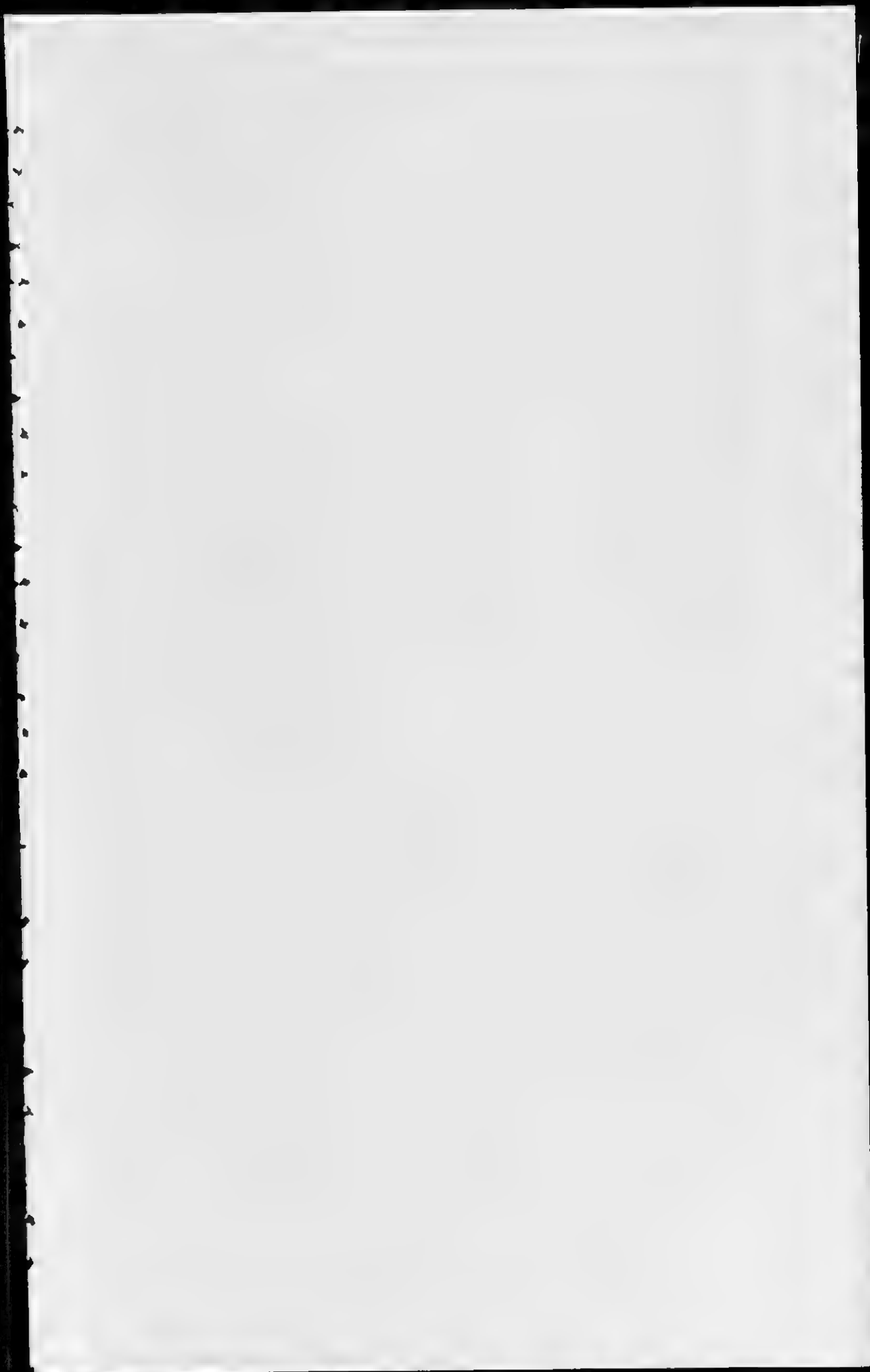
DISTRICT OF COLUMBIA *To wit:*

I, Robert E. Lammond a Notary Public in and for the District aforesaid, do hereby certify that Ned Bord who is personally well known to me to be the person named as Attorney in fact in the foregoing and annexed Deed dated the 28th day of February, A. D. 1958, to acknowledge the same, personally appeared before me in the District aforesaid, and as Attorney in fact as aforesaid, and by virtue of the power and authority in him vested by the aforesaid Deed, acknowledged the same to be the act and deed of SEDGWICK GARDENS INC. the Corporation grantor—therein, and delivered the same as such.

GIVEN under my hand and official seal, this 28th day of February A. D. 1958.

ROBERT E. LAMMOND

(SEAL)



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,476

NED BORD and ANNE R. BORD, *Petitioners*

v.

DISTRICT OF COLUMBIA, *Respondent*

On Petition for Review of the District of Columbia Tax Court

BRIEF FOR PETITIONERS

United States Court of Appeals
for the District of Columbia Circuit

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Nathan J. Paulson
CLERK

NATHAN SINBOD

WERNER STRUPP

Attorneys for Petitioners

1735 DeSales Street, N.W.

Washington, D. C.

QUESTIONS PRESENTED

1. Did the District of Columbia Tax Court err in ruling that the assessment in question was not barred by the three year statute of limitations when the respondent did not issue a "notice of deficiency" within the required time?

2. Did the Tax Court err in holding that the petitioners received a dividend from Sedgwick Gardens, Inc. when the real property sold was intended to be distributed in liquidation, and the stockholders had contracted to make the sale individually?

3. Did the Tax Court err in sustaining disallowance of a bad debt deduction claimed by petitioners, when the evidence established that the debt became substantially worthless in 1958?

4. Did the Tax Court err in denying petitioners' motion for further hearing when that Court in deciding the bad debt question relied on a theory and issues not raised by either party?

5. Did the Tax Court err in sustaining the assessment of a negligence penalty when the item of alleged income is controversial and the decision not to report it was based on professional advice?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,476

NED BORD and ANNE R. BORD, *Petitioners*

v.

DISTRICT OF COLUMBIA, *Respondent*

On Petition for Review of the District of Columbia Tax Court

BRIEF FOR PETITIONERS

JURISDICTIONAL STATEMENT

This is a proceeding to review a decision of the District of Columbia Tax Court based upon its findings of fact and conclusions of law which substantially affirmed a deficiency assessment in income taxes made against the petitioners in connection with their joint 1958 District of Columbia income tax return. The decision of the Tax Court was entered on November 15, 1963 (J. A. 47 and 48); the petitioners' motions for reconsideration, for further hearing, to revise findings of fact and to vacate the decision were denied on January 9, 1964 (J. A. 48-51).

The petition to review the decision was filed on January 30, 1964 (J. A. 54).

The jurisdiction of this Court is invoked pursuant to the provisions of Section 1, Title XV, Article I of the Act of July 16, 1947, 61 Stat. 328, ch. 258 (Section 47-1593, D. C. Code, 1961) and Sections 3 and 4, Title IX of the Act of August 17, 1937, 50 Stat. 673, ch. 690, as added by Section 8 of the Act of May 16, 1938, 52 Stat. 371, ch. 223; and as amended by Section 5 of the Act of July 26, 1939, 53 Stat. 1108, ch. 367, as amended by Section 3 of the Act of July 10, 1952, 66 Stat. 543, ch. 649 (Sections 47-2403 and 47-2404, D. C. Code, 1961).

STATEMENT OF CASE

The petitioners on March 15, 1962, herein entered into an agreement with the Finance Officer of the District of Columbia in respect to the statute of limitations for the year 1958. (J. A. 15, 88-89). It was stipulated by the parties that no further agreement in relation thereto was entered into. (J. A. 87). A letter of "indicated adjustment" in income tax liability was sent to the petitioners on September 12, 1962 (J. A. 16, 90). On November 21, 1962, bills were mailed to the petitioners together with a "recomputation" of the "proposed deficiency" (J. A. 16, 95-97). The agreement of March 15, 1962 had specified that a "notice of deficiency" would have to be sent prior to October 15, 1962, if the assessment were not made before that date (J. A. 16, 89). With the exception of an amount of \$23.45, the Tax Court sustained the deficiency assessment of \$12,423.62, which included a negligence penalty of \$481.16 and interest of \$2,319.20. (J. A. 17, 47-48).

The evidence showed that petitioner Anne R. Bord was a stockholder of Sedgwick Gardens, Inc., a Maryland Corporation, which on and before January 10, 1958 owned an apartment house in the District of Columbia known as "Sedgwick Gardens". (J. A. 6). On January 27, 1958,

Anne R. Bord and others entered into a contract as "liquidating stockholders of Sedgwick Gardens, Inc." for the sale of the real property (J. A. 8, 80). The contract was accepted by Darwin Corporation, the purchaser, on the same date. (J. A. 8, 80). There had been a prior offer and counteroffer, but no final acceptance of a contract (J. A. 8). On January 10, 1958, the directors of Sedgwick Gardens, Inc., with the approval of the stockholders, directed the liquidation of the corporation and the distribution of its assets to the stockholders, not later than December 31, 1958 (J. A. 77). At the time of settlement, the real property was transferred from the corporation to 3726 Conn. Ave., Inc. (J. A. 9, 115). At the direction of the corporation, the sales proceeds were distributed to the individual former stockholders (J. A. 9-10, 103). Testimony showed that negotiations for the sale of the property had been in progress for some time, although no final agreement was reached on price until the contract date (J. A. 63, 69). The accountant representing the corporation testified that he had recommended the liquidation for some time (J. A. 70). The operations of the corporation were continued until February 28, 1958 (J. A. 12, 72). The final balance sheet of the corporation reflected a deficit of \$5,602.04 (J. A. 45, 47).

The petitioners on their 1958 income tax return had claimed a deduction of \$86,708.99 for "Worthless Business Loan—Sun Corp." (J. A. 15, 109). The evidence showed that Ned Bord was an officer and director of Sun Corporation (J. A. 39, 68). The testimony showed that due to needs of the business and in hopes of improving an unsuccessful venture, petitioner New Bord advanced substantial sums of money to Sun Corp. (J. A. 68-69). The said corporation finally went into bankruptcy (J. A. 39, 69). Ned Bord filed his claim in the bankruptcy proceedings in the amount of \$99,520.95 (J. A. 39, 88). In 1960, the Trustee of the bankrupt corporation, Mr. Bord and others compromised their claims (J. A.

39-40, 98-102). The petitioner testified that he withdrew his claim because he realized that he would receive little from the assets of the corporation and wanted to save expenses of litigation (J. A. 65-66).

The respondent assessed a negligence penalty against the petitioners (J. A. 3). Testimony showed that the proceeds from the sale of Sedgwick Gardens were considered as non-taxable on the advice of the petitioners' accountant (J. A. 64, 76).

The petitioners moved the Tax Court for reconsideration of its decision, for further hearing, to revise findings of fact and to vacate the decision (J. A. 2, 48). The motions were opposed by the respondent and denied by the Tax Court (J. A. 2, 51-53).

STATUTES INVOLVED

D. C. Code (1961) Title 47:

§ 47-1551c. General definitions.

For the purposes of this subchapter and wherever appearing herein, unless otherwise required by the context—

• • • • •

(l) The words "capital assets" mean any property, whether real or personal, tangible or intangible, held by the taxpayer for more than two years (whether or not connected with his trade or business), but do not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the end of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(m) The word "dividend" means any distribution made by a corporation (domestic or foreign) to its stockholders or members, out of its earnings, profits, or surplus (other than paid-in surplus), whenever earned by the corporation and whether made in cash or any other property (other

than stock of the same class in the corporation if the recipient of such stock dividend has neither received nor exercised an option to receive such dividend in cash or in property other than stock instead of stock) and whether distributed prior to, during, upon, or after liquidation or dissolution of the corporation: *Provided, however,* That in the case of any dividend which is distributed other than in cash or stock in the same class in the corporation and not exempted from tax under this subchapter, the basis of tax to the recipient thereof shall be the market value of such property at the time of such distribution: *And provided, however,* That the word "dividend" shall not include any dividend paid by a mutual life insurance company to its shareholders.

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§ 47-1557b. Deductions.

(a) Deductions allowed.—The following deductions shall be allowed from gross income in computing net income:

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(4) *Losses*.—Losses sustained during the taxable year and not compensated for by insurance or otherwise—

(A) if incurred in a trade or business; or

(B) if incurred in any transaction entered into for the production or collection of income subject to tax under this subchapter, or for the management, conservation, or maintenance of property held for the production of income subject to tax under this subchapter, though not connected with any trade or business; or

(C) of property not connected with a trade or business; if such losses arise from fires, storms, shipwrecks, thefts, or other casualty: *Provided, however,* That no such loss shall be allowed as a deduction under this subsection if such loss is

claimed as a deduction for inheritance- or estate-tax purposes: *And provided further*, That this subsection shall not be construed to permit the deduction of a loss of any capital asset as defined in this subchapter.

(5) *Bad debts*.—Debts ascertained to be worthless and charged off within the taxable year or, in the discretion of the Assessor, a reasonable addition to a reserve for bad debts. When satisfied that a debt is recoverable only in part, the Assessor may allow such debt, in an amount not in excess of the part charged off within the taxable year, as a deduction. No debt which existed prior to January 1, 1939, shall be allowed as a deduction.

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§ 47-1586. Duties of Assessor.

The Assessor is hereby required to administer the provisions of this subchapter. As soon as practicable after the return is filed, the Assessor shall examine it and shall determine the correct amount of tax. (July 16, 1947, 61 Stat. 352, ch. 258, Art. I, title XII, § 1.)

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§ 47-1586d. Determination and assessment of deficiency.

If a deficiency in tax is determined by the Assessor, the taxpayer shall be notified thereof and given a period of not less than thirty days, after such notice is sent by registered mail or by certified mail, in which to file a protest and show cause or reason why the deficiency should not be paid. Opportunity for hearing shall be granted by the Assessor, and a final decision thereon shall be made as quickly as practicable. (July 16, 1947, 61 Stat. 352, ch. 258, Art. I, title XII, § 5; June 11, 1960, 74 Stat. 203, Pub. L. 86-507, § 1(54).)

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§ 47-1586L. Period of limitation upon assessment and collection.

(a) *General rule.*—Except as provided in subsection (b) of this section—

(1) the amount of income taxes imposed by this subchapter shall be assessed within three years after the return is filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period;

(2) in the case of income received during the lifetime of a decedent, or by his estate during the period of administration, or by a corporation, the tax shall be assessed, and any proceeding in court without assessment for the collection of such tax shall be begun within twelve months after written request therefor (filed after the return is made) by the executor, administrator, or other fiduciary representing the estate of such decedent, or by the corporation, but not after the expiration of three years after the return is filed. This subsection shall not apply in the case of a corporation unless—

(A) such written request notifies the Assessor that the corporation contemplates dissolution at or before the expiration of such twelve-month period; and

(B) the dissolution is in good faith begun before the expiration of such twelve-month period; and

(C) the dissolution is completed;

(3) if the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within five years after the return was filed;

(4) for the purposes of subsections (a), (1), (a) (2), and (a) (3), a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day.

(b) *False return.*—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(c) *Waiver.*—Where before the expiration of the time prescribed in subsection (a) for the assessment of the tax, both the Assessor and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

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§ 47-1589b. Additions to the tax in case of deficiency.

(a) *Negligence.*—If any part of any deficiency is due to negligence, or intentional disregard of rules and regulations but without intent to defraud, 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected, and paid in the same manner as if it were a deficiency.

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§ 47-2404. Review by court—Procedure—Decision of Board, when final—Modification or reversal.

(a) The decision of the Board may be reviewed by the court as hereinafter provided if a petition for such review is filed by either the District or the taxpayer within thirty days after the decision is rendered. Such petition for review shall be filed with the Board, and shall be in such form as the Board by regulation shall provide. Upon such review the court shall have the power to affirm, modify, or reverse the decision of the Board with or with-

out remanding the case for hearing as justice may require. The court shall have the exclusive jurisdiction to review the decisions of the Board in the same manner and to the same extent as decisions of the United States District Court for the District of Columbia in civil actions tried without a jury; and the judgment of the court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari in the manner provided in title 28, United States Code, section 1254, as amended. The court is authorized to adopt rules for the filing of the record on review, the preparation of the record for review, and the conduct of the proceedings upon such review.

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U. S. Code (1958). Title 26:

§ 6213. Restrictions applicable to deficiencies; petition to Tax Court.

(a) Time for filing petition and restriction on assessment.

Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421 (a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

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§ 6503. Suspension of running of period of limitation.

(a) Issuance of statutory notice of deficiency.

(1) General rule.

The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or the collection by levy or a proceeding in court, in respect of any deficiency as defined in section 6211 (relating to income, estate, and gift taxes), shall (after the mailing of a notice under section 6212 (a)) be suspended for the period during which the Secretary or his delegate is prohibited from making the assessment or from collecting by levy or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for 60 days thereafter.

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STATEMENT OF POINTS

1. The District of Columbia Tax Court erred in ruling that three year statute of limitations on assessments had not expired when an agreement between the parties required a "notice of deficiency" to be sent to the taxpayers before a certain date and no such notice was in fact sent.

2. The Tax Court erred in holding that the consideration received by petitioner Anne R. Bord from the sale of Sedgwick Gardens was a dividend; the evidence shows that the stockholders received the real property in liquidation and made the sale in their individual capacities.

3. The Tax Court erred in sustaining disallowance of a bad deduction representing advances made by one of the petitioners to Sun Corporation; a debtor-creditor relationship having arisen and the claim being worthless, the loss was incurred in 1958, irrespective of subsequent events.

4. Having decided the bad debt question, in part at least, on a theory not raised by the parties, the Tax Court should have granted the motion for further hearing.

5. The Tax Court erred in sustaining the assessment of a negligence penalty; there was no disregard of regulations and the taxpayers relied on professional advice.

SUMMARY OF ARGUMENT

The normal statute of limitations on petitioners' 1958 tax return would have expired April 15, 1962. However, prior to that date, the taxpayers agreed in writing with the Finance Officer that any tax could be assessed before October 15, 1962. It was also provided that if a "notice of deficiency" were mailed prior to October 15, 1962, any taxes could be assessed for sixty days thereafter. The petitioners contend that the letter of September 12, 1962 was a mere tentative notice of an "indicated adjustment" and fails to meet the requirements of the statute and of the agreement.

Although a formal transfer of the real property known as "Sedgwick Gardens" was made directly from Sedgwick Gardens, Inc. to the purchaser, 3726 Conn. Ave., Inc., the stockholders had previously contracted to sell the property individually. They had voted to liquidate the corporation and to distribute the assets to themselves. There was never any intention to have the corporation make the sale, nor was there any evidence that the corporation rather than the stockholders had carried on the preliminary negotiations. The petitioners contend that the law entitled them to arrange disposition of the property in such a way as to produce the minimum tax. They were under no obligation to have the corporation make the sale in order to produce a greater tax liability. The law, as interpreted by this Court, is plain in precluding a taxable dividend in liquidation unless the corporation's surplus became first enhanced by the gain.

One of the petitioners advanced substantial funds to a corporation in which he owned stock. He did this in response to the corporation's business needs. The Tax Court was in doubt whether the advances were loans or capital contributions. The Court below further found that a compromise, almost two years later, in an ensuing bankruptcy proceeding, amounted to consideration for the funds paid. The petitioners contend that a loan was made, that the debt became worthless in 1958, and that the subsequent events were immaterial. Even if the advances were capital contributions, this did not eliminate a lawful deduction.

Although the theory of a capital contribution was first raised by the Tax Court, not by the parties, the trial Court refused petitioners' request for a further hearing. The petitioners contend that this was reversible error.

The respondent assessed a negligence penalty. The Sedgwick Gardens transaction involved controversial tax considerations. The petitioners relied on their accountant's advice. There was no rule or regulation on the subject. Accordingly, it was erroneous to affirm imposition of the penalty.

ARGUMENT

I.

The Tax Court Erred in Ruling That the Assessment Was Not Barred by the Statute of Limitations

The petition by which the present case was initiated in the Tax Court raised the issue of the statute of limitations. (J. A. 3). The petitioners alleged that the taxes in question had not been assessed within the three year period required by Section 47-1586i(a)(1), D. C. Code (1961). The respondent contended, and the Tax Court agreed, that although the taxes were not assessed within the three year period, an agreement between the taxpayers and the District of Columbia Finance Office had

extended the statutory period making the assessment timely. As the Tax Court points out (J. A. 23), the respondent concedes that the assessment was not made within the normal three years. Accordingly, the only question before the Tax Court was whether an agreement pursuant to Section 47-1586i(c) had in fact been entered into.

The consent signed by the parties is found on page 89 of the Joint Appendix. It reveals that on March 15, 1962, prior to the expiration of the three year limitation period, the taxpayers and the Finance Office entered into an agreement fixing the expiration of the statute of limitations for their 1958 income tax return on October 15, 1962. The agreement form provides that if a "notice of deficiency" was sent prior to October 15, 1962, the period of time for assessment would be extended for an additional sixty days. No further agreement was signed. On September 12, 1962, the Finance Office mailed a certified mail letter to the petitioners (J. A. 90) which stated that an examination of their 1958 income tax return "indicates" that an adjustment of tax liability was warranted. This same letter gave the taxpayers the opportunity to accept the adjustments or to file the protest and to request a hearing "prior to final determination". In addition, the letter stated that "careful consideration" would be given to any protest filed. On November 21, 1962, the Finance Office advised the taxpayers that the "proposed deficiency" had been recomputed and it enclosed bills in accordance with such recomputation.

It is obvious, of course, that the tax was not assessed until November 21, 1962. The question is, was a notice of deficiency mailed prior to October 15, 1962? Unlike the Federal tax law which specifically defines a "notice of deficiency" in Section 6212, Title 26, U. S. C., the District of Columbia Code contains no precise definition of the term. However, we submit that an examination of the

applicable portions of our Code reveals a meaning closely similar to that followed for many years in the Federal tax field. Section 47-1551c(q)(1) defines "deficiency" as "the amount or amounts by which the tax imposed by this subchapter as determined by the Assessor exceeds the amount shown as the tax by the taxpayer upon his return". The procedure for determining deficiencies requires that the taxpayer be given an opportunity for hearing before a "final decision" is made thereon (Section 47-1586d). Section 47-1586 requires the Assessor (now the Finance Officer) to "determine the correct amount of tax". It appears plain to us that in the case of a deficiency, the correct tax cannot be determined until opportunity for protest and hearing have been granted, as the "final decision" of which the statute speaks is to be made following the grant of such opportunity. The letter of September 12, 1962 was a mere proposal of an adjustment. Whether the "adjustment"—the exact word used in the letter—would result in a deficiency would depend not only on the taxpayers' response, the contents of their protest, if they filed one, but also on the "final decision" which the Finance Officer is required to make. Only if the taxpayers failed to respond altogether would the "final determination" be made in accordance with the proposal. Significantly, the letter of November 21, 1962, speaks of a "proposed deficiency". Since that letter enclosed the final bill, it must have been the "notice of deficiency" referred to in the original agreement. Whether the writer of the letter of November 21, 1962 regarded the letter of that date as another "proposed deficiency" or a "revised deficiency" which is another term used in the letter, is unimportant as in all events it was sent after the date specified in the agreement, i.e. October 15, 1962.

We submit that an "indicated adjustment" is not a notice of deficiency. An invitation to a hearing and the

filing of a protest are steps which are wholly preliminary to the determination of a deficiency. The law precludes the Finance Officer from determining a deficiency before the taxpayer has had an opportunity to be heard. How could he then give "notice" of a deficiency which he has not determined and has had no power to determine? The "deficiency" as it has been traditionally understood is the final administrative act of the taxing authority. *Fidelity Insurance Agency*, 1 B.T.A. 86; *Terminal Wine Co.*, 1 B.T.A. 697; *New York Trust Co. et al*, 3 B.T.A. 583, *Ventura Consolidated Oil Fields v. Ragan* (9th Cir. 1936) 86 F.2d 149, cert. den. 300 U.S. 672. Apparently, the Tax Court believed that the letter of September 12, 1962 met the requirement of Section 47-1586d, but reference to that section shows that it contemplates notice of a deficiency that has been "determined" and a showing of cause why the same should not be paid. This statutory language differs materially from an indication that an "adjustment" is "warranted". The respondent saw fit to employ language far more tentative than is contemplated in Section 47-1586d. The taxpayers had a right to view the consent of March 15, 1962 as an agreement to have any deficiency that might be found to be due *determined* prior to October 15, 1962 and to receive notice thereof in the manner provided by law. Any deviation from the statutory procedure, including defects in documents, was taken at the government's peril as it seeks here to rely on a waiver of the taxpayers' legal right. *T. W. Warner Co.*, 19 B.T.A. 872. Apparently, the respondent drafted its form as though the sending of a "notice of deficiency" would suspend the running of the period of limitations, as is the case under Section 6503 (a)(1) of the Internal Revenue Code and as though there were a period of time during which the Finance Officer is prohibited from making an assessment, referred to in the same Federal statute. Neither provision has

a counterpart in the District law.* Finally, we point out that a "notice of deficiency" following a "determination" of a deficiency—not an "indication" of an "adjustment" might well satisfy the meaning of the agreement. But such notice must accord with Section 1586d; it did not do so in this case.

Although the Tax Court's decision is not founded on it, some reference should here be made to its finding that the taxpayers omitted more than 25% of their gross income from their returns. (J. A. 15). Under certain circumstances, such a finding might be relevant to support the respondent's reliance on Section 47-1533(a)(3) of the Code. This section permits assessment of taxes during a five year instead of a three year period. However, the respondent did not rely on that section. In a companion case, *Victor Block v. District of Columbia*—heard with the instant case but not appealed to this Court—the Tax Court ruled that not only must the respondent prove the exception of Section 47-1533(a)(3), but it must also plead it. (J. A. 31). In the present case, it did neither, and therefore, if the three year statute has in fact expired, reliance on the five year provision is not available to the respondent. Moreover, the Tax Court's finding respecting the omission of income cannot be supported as the respondent offered no evidence regarding the gross income of each of the 14 partnerships from which the petitioners received income. It has been firmly established in Federal tax cases that if omission of gross income is claimed, the income of each partnership must be considered. *Switzer*, 20 T. C. 759, rev'd. (9th Cir.) 9/17/54; *Rose*, 24 T. C. 755; *Accardo*, T. C. Memo 58-67;

* In Federal practice, not only does the notice of deficiency suspend the statute of limitations during the time that an appeal may be taken to the U. S. Tax Court, but for sixty days after such decision has become final. During the ninety day period in which a petition in the U. S. Tax Court may be filed, the Commissioner of Internal Revenue is actually prohibited from making an assessment. Section 6213(a), I.R.C. The language in the District's consent form must have been derived from that source.

see also Section 702(c), 1954 Internal Code. For the various reasons stated, the petitioners moved the Tax Court to strike Finding of Fact 17(b); the Tax Court denied that motion.

II

The Tax Court Erroneously Held That the Petitioners Received A Dividend from the Sale of Sedgwick Gardens

The Tax Court concluded that the petitioners realized a taxable dividend from the sale of Sedgwick Gardens apartments, notwithstanding the fact that the contract for the sale of the property was entered into by the stockholders—one of whom was petitioner Anne R. Bord—in their individual capacities.

The essential facts relating to the sale are not in dispute. The corporation, Sedgwick Gardens, Inc., had been in existence for many years. Until the time of the transaction here involved, it had been the owner of the real property. The testimony showed that for a considerable time prior to the sale of the property, the stockholders had been advised to liquidate the corporation. They had been told by their accountants that substantial tax advantages would result if they owned and rented the property as individuals rather than through the medium of a corporation.

A meeting of the directors of Sedgwick Gardens, Inc. was held on January 10, 1958. At that time the liquidation and dissolution of the corporation were authorized. It was further directed by the Board that, subject to the approval of the stockholders, the liquidation and dissolution were to be undertaken forthwith, but in no event later than December 31, 1958. After the payment of all corporate debts, the assets of the corporation were to be distributed to the stockholders in direct proportion to

their ownership. All of the stockholders approved the directors' action in writing on January 10, 1958.

A sales contract, dated January 17, 1958, containing an offer by Darwin Corporation to purchase premises 3726 Connecticut Avenue, N.W. (Sedgwick Gardens apartments) was submitted. On January 27, 1958, the individuals made what amounted to a counter-offer in their capacities as "liquidating stockholders". On the same day, Darwin Corporation accepted the revised contract. Settlement took place on February 28, 1958. The proceeds were paid to the individual owners. The deed was executed by the corporation directly to the purchaser or his nominee. A letter was written by one of the officers of Sedgwick Gardens, Inc., authorizing the disbursement of funds in accordance with the contract. Until February 28, 1958, rental income and expenses of Sedgwick Gardens remained those of the corporation. As of that day, the books and records of the corporation show the transfer of all assets and liabilities to the stockholders in exchange for their stock. Thereafter, the only further activity of the corporation consisted of winding up its affairs, primarily the payment of expenses of operating the apartment house before the date of sale. These transactions were effected by the rental agent and not through a corporate bank account. The commission to the broker for selling the real estate was paid by the same rental agent, not on behalf of the corporation, but for the individual owners. The final corporate tax return was filed as of February 28, 1958.

Against this background, the only question presented for resolution is whether the corporation or the individual stockholders made the sale. The respondent asserts a tax based on a "liquidating dividend". It must be assumed that all parties concur that unless the corporation made the sale, there could be no liquidating dividend. This court's decision in *District of Columbia v. Oppenheimer*

(1962) 112 U.S. App. D.C. 239, 301 F.2d 563, can leave no doubt on this point. As the Court said in that case:

“The critical statutory word is ‘earned’. Since the corporation never realized the appreciation by sale or otherwise, it was never a part of the corporation’s income or earnings”.

We submit, therefore, that this part of the present case requires an answer to but one question: did the corporation realize the appreciation “by sale or otherwise”?

Consideration of the documentary evidence and of the testimony, in our view, indisputably leads to the conclusion that the individuals intended to sell the property in their own names and capacities and not on behalf of the corporation. It is also clear that some thought had been given for several years to a liquidation of the corporation and that this had been independent of a possible decision to sell the real property. On January 10, 1958, the date of the directors meeting, there was no agreement to sell the property. What discussions there had been respecting a possible sale were wholly preliminary. As late as January 17, 1958, there was no agreement on the sales price and a binding agreement was not concluded until January 27, 1958. This agreement imposed no obligation on the corporation. Any rights that the purchaser had were against the individuals. The individuals received the property from the corporation in exchange and cancellation of their stock. There is no evidence that the corporation negotiated any part of the sale or that it acquired any rights or assumed any obligations under the contract of sale. There are only two facts which involve the corporation in this transaction. One is the deed and the other the letter authorizing the disbursement of funds. The explanation for both documents is the same. A sale had been made by the individuals who were to receive the property in liquidation. It would be needlessly

cumbersome to have one deed to the real property from the corporation to the stockholders in liquidation and another from the individuals to the purchaser. It was far more convenient to prepare a single deed to accomplish the purpose, especially since one of the individual owners resided in another city and would have had to attend to sign the additional deed. The letters regarding payment of the sales proceeds, of necessity had to be signed by an officer of the corporation in order to protect the title company who was concerned with the record title only and not with the sales contract or actual ownership. We submit, therefore, that the two documents in which the corporation is named in no way change the basic nature of this transaction. The parties simply selected the method most practical and expedient to carry out their objective.

The question of whether the sale of property is to be attributed to a corporation or if it was made by its stockholders individually, has been the subject of much litigation in Federal taxation. Prior to the enactment of the 1954 Internal Revenue Code, this involved highly important determinations as the attribution to the corporation would usually result in a tax at both the corporate and stockholder levels. The earliest in a long line of well-known cases is *Commissioner v. Court Holding Co.*, 324 U.S. 331, 65 S. Ct. 701, 89 L. Ed. 981. In that case it was held that the sale was that of the corporation, primarily because the sales contract named the individuals as vendors *after* an oral agreement for the sale had been reached with the corporation. The Court found that there had been an attempt to transform the sale by one party into that of another. In a later case, however, the Supreme Court refined this doctrine to make it clear that it did not intend to regard a sale as made by the corporation when the parties deliberately arrange it so as to make it a shareholder transaction. *Cumberland Public*

Service Co. v. U.S., 338 U.S. 451, 70 S. Ct. 280, 94 L. Ed. 25. Here the Court said:

"While the distinction between sales by a corporation as compared with distributions in kind followed by shareholder sales, may be particularly shadowy and artificial when the corporation is closely held, Congress has chosen to recognize such a distinction for tax purposes. . . . Consequently, a corporation may liquidate or dissolve without subjecting itself to the corporate gains tax, even though a primary motive is to avoid the burden of corporate taxation".

In the decisions following the Supreme Court's ruling in the *Cumberland* case, the courts have generally emphasized that whenever the evidence demonstrates that a sale was preceded by a liquidation, or at least by the requisite, steps leading to a liquidation, the sale is to be regarded as having been made by the individuals. *U. S. v. McNair Realty Co.*, (9th Cir. 1961) 298 F.2d 35; *Merkra Holding Co.*, 27 T. C. 82; *Steubenville Bridge Co.*, 11 T. C. 789; *Doyle Hosiery Corp.*, 17 T. C. 641. The Tax Court in the *Steubenville* case, expressed the principle thus:

". . . on the other hand where the sale has been made by the stockholders after liquidation has been initiated and with no contractual obligations assumed by the corporation prior to the negotiations of liquidation, the courts have generally taxed the resulting gain to the stockholders."

An especially appropriate case in the consideration of the present controversy is *Howell Turpentine Co. v. Commissioner of Internal Revenue* (3rd Cir. 1947) 162 F.2d 319. In discussing the fact that in that case, the stockholders entered into a contract of sale before they acquired title to the property, the Court said:

"He can sell his interest by selling his stock, but he cannot effectively convey any particular property of the corporation prior to a liquidation.

"But he may validly contract to sell it before any steps are taken towards liquidation, if he has a reasonable prospect of obtaining title to it within the time fixed by the contract for the conveyance. This is true of stockholders as it is of people in general who have a prospect of obtaining title and are willing to assume a liability if they should fail".

In a concurring opinion in the same case, Judge Lee stated:

"To reach a contrary conclusion, the Court would have to hold that title in the corporation is itself alone sufficient to warrant a finding that negotiations by and on behalf of the stockholders looking to a sale of property passing to them in liquidation is for tax purposes a corporate sale".

It should be mentioned in passing that unlike in the *Howell* case, the stockholders of Sedgwick Gardens, Inc. had not contracted to sell the property until *after* the liquidation of the corporation had been approved.

That the taxpayers may be partially or wholly motivated by considerations that are designed to save them taxes, if the sale is made individually, was expressly held to be without significance by the Supreme Court in the *Cumberland* case. In *U. S. v. Cummins Distilleries Corp.*, (6th Cir. 1948) 166 F.2d 17, the Court quotes from its decision in *Marshall v. Commissioner*, 57 F.2d 633: "There was nothing unlawful, or even mildly unethical in the motive of petitioner to avoid some portion of the burden of taxation" and then adds: "If this doctrine is now to be rejected because of the needs of the Treasury or for some other reasons, it may not be inappropriate to say that its rejection must be directed by the Congress or ultimate judicial authority, otherwise it must be ap-

plied". In *Howell Turpentine Co.*, *supra*, the Court said this on the subject of motivation by tax reasons:

"The confessed fact that the Howells knew there was a latent gain in the land, and that it would be more heavily taxed if realized by a sale by the corporation than if realized by them as stockholders after a liquidation in kind, is of no legal significance.

"... That this mode of lawful dealing knowingly saved taxes is not an argument that it was not so done, but a powerful argument that it was". See also: *Jones v. Helvering*, 63 App. D.C. 204, 71 F.2d 214, 217.

We submit that what has been pointed out here demonstrates that there was no sale of Sedgwick Gardens by the corporation, and hence the sale could not give rise to a corporate dividend.

The Tax Court believed the decision of this part of the case to be controlled by this Court's opinion in *Berliner v. District of Columbia*, 103 U.S. App. D.C. 351, 258 F.2d 651. We respectfully submit that the Tax Court is mistaken. In the *Berliner* case, this Court merely held that a corporate sale resulting in a gain gives rise to a dividend, when that gain is distributed to the stockholders. The facts herein detailed show that the sale was made by the individuals and not by the corporation. Such was not the contention of the taxpayers in the *Berliner* case. There the argument was made that the liquidating distribution including the gain from the sale resulted in a non-taxable exchange. Contrary to the Tax Court's impression, these petitioners made no such argument. They simply urge that they received the corporate assets in liquidation and sold them as individuals. The evidence shows beyond a doubt that this is precisely what they intended to do.

III

**The Tax Court Erred in Sustaining the Disallowance of a
Bad Debt Representing Advances to Sun Corp.**

The Tax Court's full recital of the facts involving the monies paid by petitioner to Sun Corporation, (J. A. 38-41) makes it unnecessary to repeat them here. However, the inferences and conclusions drawn from these facts by the Tax Court are entirely without support. All parties to the case appear to have assumed that there was no controversy that the petitioner had made the loans. In fact the amounts claimed and deducted were stipulated and the audit statement raised no question that the advances were not in fact made. Also, from the Tax Court's opinion, it appears that the Court did not really doubt that the funds were paid, but it found the proof deficient to establish whether they were loans or capital contributions.

There was no suggestion in the record that the petitioner in respect to the advances regarded himself as anything other than a creditor. The fact that the amount and time of repayment may have been uncertain is in no way inconsistent with the debtor-creditor relationship. *Birdsboro Steel Foundry & Machine Co. v. U. S.*, (Ct. Cl. 1933), 3 F. Supp. 640. To be sure, whether a loan or capital contribution was intended is essentially a question of fact. *Ortmayer v. Commissioner*, (7th Cir. 1959) 265 F.2d 848; *Gilbert v. Commissioner* (2nd Cir. 1957) 248 F.2d 399. However, as the Court said in *Commissioner v. National Bank of Commerce of San Antonio, Tex.*, (5th Cir. 1940) 112 F.2d 946:

"Situations giving rise to tax losses or gains are not to be dealt with by strained and unreal constructions to accrue or increase a tax, but they are to be given a common sense and natural construction in accordance with the realities of the facts making them up."

Here the realities, as disclosed by the record, show that the petitioner advanced funds to a company in which he had a substantial interest. There are no facts to justify the belief that he did not make the payments with full expectation of their return.

It is important to point out that even if the advances were in fact capital contributions, it does not follow that the petitioners' deduction must be disallowed. Subject to the limitations of Sections 47-1557b(4)(C) and Section 47-1551c(1) relating to capital assets, capital contributions would be allowable deductions under either Section 47-1557b(4)(A) or Section 47-1557b(4)(B), depending on whether the losses were incurred in a trade or business.

Apparently, the Tax Court affirmed the disallowance primarily because of the events occurring in conjunction with the bankruptcy proceeding in which Sun Radio Corporation became involved in 1959. The record shows that Sun's financial situation at the end of September, 1958 had reached hopeless insolvency. In view of those facts, it cannot be doubted that the petitioners were entitled to claim their losses. In the words of the Supreme Court "The taxing act does not require the taxpayer to be an incorrigible optimist." *U. S. v. S. S. White Dental Manufacturing Co.*, 274 U.S. 398, 71 L. Ed. 1120, 47 S. Ct. 598 (1927); see also *First National Bank of Bellflower*, 10 T. C. 357; *Pacific Pipe & Supply Co.*, 2 B.T.A. 870; *United States Tool Co.*, 3 B.T.A. 492; *Henry M. Jones*, 4 B.T.A. 1286; *Joseph J. Haupt*, 6 B.T.A. 1297. However, the Tax Court concluded that the compromise whereby the petitioner released his claim in the bankruptcy proceeding was a settlement for a valuable consideration.

At the outset, it should be emphasized that the compromise was approved on December 21, 1960—almost two years after the deduction was claimed. Under the law, bad debts are to be deducted when "ascertained to be worthless" (Sect. 47-1557b(5)). It has already been dem-

onstrated that there was ample evidence to regard the advances as worthless as of December 31, 1958, especially since the above provision permits "partial" charge-offs—assuming that there was some basis to believe that a portion could be recovered. It has been recognized that the mere fact that a taxpayer may recoup part of a debt in a subsequent year, may not deprive him of his deduction in the year in which the facts justify the deduction. *E. R. Hawke*, 35 B.T.A. 784, remanded on other grounds (9th Cir. 1940) 109 F.2d 946; *Curry v. Commissioner* (2nd Cir. 1941) 117 F.2d 307, 310. Accordingly, regardless of the subsequent events, if the facts established worthlessness in 1958—and they unquestionably did—the petitioners were entitled to the deduction.

Moreover, we submit that the compromise entered into in 1960 in no way invalidates the bad debt claim. It was stipulated that unsecured creditors received approximately 4% of their claims from the bankruptcy of Sun Corporation. This 4% dividend is the most that petitioner Ned Bord could be said to have surrendered. There is no evidence to indicate that the Trustee's claim had any merit. The petitioner's testimony was that he withdrew his claim because he realized he would receive virtually nothing and wanted to save expenses of litigation. (J. A. 65). Therefore, from the point of view of the petitioner's economic loss, he was surrendering a claim of less than \$4,000.00 and assumed certain additional obligations. This could only slightly affect the amount of the loss he had already sustained by reason of the advances. There is no evidence to support the Tax Court's statement that the Trustee's claim was in "excess of the officer's claims and the claim of the National Bank of Washington". From all that is known, it appears that the Trustee's claim was largely speculative. We submit that the Tax Court did not have sufficient facts before it to determine whether the 1960 settlement resulted in income to the petitioner, nor was such inquiry appropri-

ate for the disposition of this case. The Tax Court judge recognized this at the time of the hearing, for he said:

"He has an unliquidated claim that might be a good claim. If it is and he surrendered something he may have gotten income. But as far as 1958 is concerned, it is very much like a taxpayer setting up a reserve, or taking a reduction in a year, for a bad debt, taking a deduction, and filed next year, or in a subsequent year he files and somebody has paid him the debt, and he has to declare it as income; *but he could always claim that deduction in the first year.* (J. A. 74; emphasis added).

IV

The Tax Court Should Have Granted Petitioners' Motion for Further Hearing

Following entry of the Tax Court's decision, the petitioners moved that Court for a further hearing and for other relief, largely on the grounds that the Court in deciding the bad debt question had done so on a theory advanced by neither side. The issue of a capital contribution had not been raised by either party. It presented new and additional problems, such as the dates on which the payments were made.* These issues could only be resolved by additional evidence which the petitioner was prepared to offer.

We recognize, of course, that the ruling on a motion for further hearing or rehearing rests within the sound discretion of the Tax Court. However, the Courts have recognized certain specific grounds as requiring a rehearing. One of them is the decision by the tax tribunal on grounds not raised by the parties. *Helvering v. Edison Securities Corporation*, (4th Cir. 1935), 78 F.2d 85, 91; *Hanna Iron Ore Co. v. Commissioner*, (3rd Cir. 1953) 208 F.2d 759. It has also been held that under certain

* In view of the two year holding period relating to capital assets contained in Section 47-1551c(1), this inquiry becomes especially important.

circumstances, the denial of a motion for further hearing may be "a procedural error fraught with decisive substantive consequences of such a nature that justice required that it be corrected." *Rubin v. Commissioner* (5th Cir. 1958) 252 F.2d 243, 251; *Ohio Valley Rock Asphalt Co. v. Commissioner*, 68 App. D.C. 176, 95 F.2d 87; *Polizzi v. Commissioner* (6th Cir. 1957), 247 F.2d 875, 878. In an early Federal tax case, *Catham Phenix Nat. Bank & Trust Co. v. Helvering*, 66 App. D.C. 330, 87 F.2d 547, 550, this Court said:

"But the power of this Court to order a rehearing of the case does not extend only to the abuse of discretion on the part of the Board. This power may be exercised when necessary to meet the ends of substantial justice. This Court has the power under the statute to modify or reverse the decisions of the Board, if not in accordance with law 'as justice may require' (citations omitted)".

It is significant, we believe, that the statute governing review by this Court of decisions of the District of Columbia Tax Court, employs virtually the same language as is referred to in the *Chatham* case. See Section 47-2404(a), D. C. Code (1961).

We submit that it has been demonstrated that a further hearing in the instant case was not only desirable but necessary to dispose fully of the issues raised.

V

The Tax Court Erred in Sustaining the Assessment of a Negligence Penalty in This Case

The respondent assessed a 5% negligence penalty against the petitioner—apparently because of their failure to report the proceeds from the sale of Sedgwick Gardens as a taxable gain. The statute provides for an assessment of a penalty in cases of "negligence, or intentional disregard of rules and regulations. . . ." Section 47-1589b(a).

The testimony showed that the taxpayers relied on the advice of their accountant who considered the liquidation of Sedgwick Gardens, Inc. to result in no taxable gain. Whether this advice was correct or incorrect will be determined by the outcome of this litigation. The question is certainly a controversial one. Moreover, there are no regulations or rules that the taxpayers could have disregarded as none have been promulgated by the respondent on this subject. Under such circumstances, it is well-established that the negligence penalty should not be imposed. *Briggs-Weaver Machinery Co.*, 14 B.T.A. 1351; *R. W. Woody*, 19 T. C. 350; *R. E. Nelson*, 19 T. C. 575; see also Mertens, Law of Federal Income Taxation, Section 55.25. The *Journal Company* case, 46 B.T.A. 841, cited by the Tax Court, is readily distinguishable, as there a specific regulation existed which the taxpayer disregarded.

CONCLUSION

For all of the foregoing reasons, the decision of the District of Columbia Tax Court should be reversed.

Respectfully submitted,

NATHAN SINROD

WERNER STRUPP

Attorneys for Petitioners

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BRIEF FOR RESPONDENT

United States Court of Appeals
for the District of Columbia Circuit

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED SEP 17 1964

Nathan J. Paulson
CLERK

No. 18,476

NED BORD AND ANNE R. BORD,

Petitioners,

v.

DISTRICT OF COLUMBIA,

Respondent.

ON PETITION FOR REVIEW OF A DECISION OF
THE DISTRICT OF COLUMBIA TAX COURT

CHESTER H. GRAY
Corporation Counsel, D.C.

MILTON D. KORMAN
Principal Assistant Corporation
Counsel, D.C.

HENRY E. WIXON
Assistant Corporation Counsel, D.C.

ROBERT E. McCALLY
Assistant Corporation Counsel, D.C.

Attorneys for Respondent
District Building
Washington, D.C. 20004

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No. 18,476

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Respondent was mailed, postage prepaid, to Werner Strupp, Esq., attorney for petitioners, 1735 DeSales Street, N.W., Washington, D.C., 20036, this 16th day of September, 1964.

Robert E. McCally
ROBERT E. McCALLY
Assistant Corporation Counsel, D.C.

Attorney for Respondent
District Building
Washington, D.C. 20004

QUESTIONS PRESENTED

1. Where petitioners in writing agreed with the District to extend to and including October 15, 1962, the time for assessment by the District of a deficiency in income taxes against them and agreed also that if a notice of deficiency was sent to them prior to that date then the time for assessment would be further extended by a period not less than 60 days from October 15th and where a notice of deficiency was sent to petitioners prior to October 15, 1962, and assessment of a deficiency was made on November 21, 1962, was not the assessment timely?

2. Where, prior to dissolution of Sedgwick Gardens, Inc., a corporation in which petitioner Anne Bord was a stockholder, it sold at a profit real property, was not the profit realized by the corporation from the sale, part of its earned surplus which, when distributed pro rata to petitioner Anne Bord upon liquidation, was a taxable dividend to her?

3. Where petitioner Ned Bord claimed that it was error for the Assessor to disallow as deductions from gross income amounts claimed by him on his 1958 District income tax return as bad debts resulting from advances he made to a corporation, was not the disallowance correct, and properly affirmed by the Tax Court where it, on all the evidence, concluded that the advances were not loans but capital contributions and where, moreover, it clearly appeared that even if the advances were loans, Mr. Bord, in a bankruptcy proceeding involving Sun Corporation, for adequate compensation, had relinquished any claim

to reimbursement of the loans and where there was no showing in any case that the alleged loans, even if they were such, became worthless in the year in which they were taken as deductions?

4. Was not the Tax Court's denial of petitioner's motion for a further hearing correct when the motion was made after the Court had rendered its written decision in the case and where the motion was grounded on the proposition that the Tax Court, on the evidence, had incorrectly decided that petitioner Ned Bord was not entitled to a deduction for purposes of District income tax of claimed bad debt losses.

5. Where petitioners failed to report on their 1958 District income tax return the liquidation of Sedgwick Gardens, Inc., and the income received by them therefrom, notwithstanding that the return required the reporting of income, whether or not taxable, and where petitioners' claim that their failure to report was the result of reliance upon advice from their accountant was not sustained by the evidence, was not the assessment against them of a penalty for negligence in failing to make a report proper?

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NED BORD AND ANNE R. BORD,

Petitioners,

v.

DISTRICT OF COLUMBIA,

Respondent.

No. 18,476

BRIEF FOR RESPONDENT

COUNTER-STATEMENT OF THE CASE

Petitioners Ned and Anne R. Bord are husband and wife and reside at 4501 Connecticut Avenue, N.W., Washington, D.C. The tax involved is a District of Columbia individual income tax for the calendar year 1958, in the sum of \$12,423.62.

On March 15, 1962, petitioners and the District entered into a consent agreement extending to and including October 15, 1962 the time for assessment against petitioners of income taxes for 1958 (J.A. 88-89). In conformity with § 47-1586d, D.C. Code, 1961, a notice of tax deficiency was, on September 12, 1962, mailed to the petitioners by the District by certified mail (J.A. 90). The notice provided for certain tax audit adjustments in petitioners' individual income tax return for 1958 and contained a report indicating the tax audit changes and the deficiency in taxes. In addition, the notice stated that, within 30 days from the date thereof, a protest might be filed by petitioners with the Finance

Office of the District of Columbia and extended to petitioners an opportunity for a hearing in the Finance Office, if they so desired.

On November 21, 1962, the Finance Office mailed to petitioners a statement in which their deficiency in taxes had been recomputed, and included therewith, a bill for taxes dated November 21, 1962 (J.A. 97).

Petitioner Anne R. Bord was a stockholder of Sedgwick Gardens, Inc., a Maryland corporation whose principal asset was an apartment house known as Sedgwick Gardens located at 3726 Connecticut Avenue, N.W. (J.A. 6). On January 10, 1958, at a special meeting of the board of directors of Sedgwick Gardens, Inc., the corporation was authorized to liquidate its assets and dissolve, and, on January 17, 1958, a proposed sales contract for the purchase of Sedgwick Gardens was submitted to the stockholders by Darwin Corporation. On January 27, 1958, the stockholders submitted to Darwin a counter-offer, which, on the same date, was accepted by the Darwin Corporation (J.A. 80). A settlement date of February 28, 1958, was agreed to and Sedgwick Gardens, Inc., ordered from a title company an examination of the title of the property. In a letter signed by Ned Bord, its Vice-President, the corporation sent certain instructions to the title company including the amount of the net proceeds that were to be paid to each stockholder (Petitioners' Exhibit No. 7; J.A. 103). On the settlement date, a deed conveying the property was executed by Sedgwick Gardens, Inc., the corporate owner of record, and not by the liquidating stockholders of the corporation (J.A. 9, 115, 116).

On March 4, 1958, the State of Maryland approved Articles of Dissolution of Sedgwick Gardens, Inc. Thereafter, on May 9, 1958, Sedgwick Gardens, Inc., filed with the Finance Office a final District corporation franchise tax return for the period January 1 through February 28, 1958 (J.A. 92, 105-112), which return indicated that rental income as well as other miscellaneous income was received by Sedgwick Gardens, Inc., through the latter date. In addition thereto, it showed that petitioner Ned Bord, as Vice-President, and the President, the Secretary, and the Treasurer were each employed by and continued to receive from the corporation a salary for their services for the period covered by the return (J.A. 85). Statements of rent collections were also sent to Sedgwick Gardens, Inc., for this same period by its rental agent, Randall H. Hagner (J.A. 11-12) which showed the rents collected for the corporation and the expenses incurred by the corporation for the operation of Sedgwick Gardens.

Petitioners did not, on their 1958 District of Columbia joint individual income tax return, disclose the sale by Sedgwick Gardens, Inc., of 3726 Connecticut Avenue, N.W., or the income received by them upon the dissolution of the corporation. Their accountant testified that he had prepared petitioners' return and did not "put it on the return" (J.A. 75-76).

On their said 1958 tax return petitioners claimed a deduction of \$86,708.99 as a worthless business loan to the Sun Corporation (J.A. 15, 109). Petitioner Ned Bord testified that he, while an officer and director

of Sun Corporation (J.A. 39, 68), had, due to the needs of the corporation, loaned to it substantial sums of money. On cross examination Mr. Bord testified that he held a real estate salesman's license and not a real estate broker's license. He further testified that, while he was occasionally in the business of lending money, it was not for profit and that he did not possess a money lender's license (J.A. 66-67, 70).

The Sun Corporation was, on March 17, 1959, adjudicated a bankrupt. Thereafter, Mr. Bord filed with the bankruptcy court claims totaling \$99,520.95, which included the amounts he had listed in his District tax return as worthless business loans to the Sun Corporation. In 1960, Ned Bord and certain of his associates proposed a compromise with the Trustee in Bankruptcy of various claims, including claims by the Trustee against them. On September 21, 1960, the Referee in Bankruptcy signed an order authorizing a compromise in which Ned Bord, along with two other named individuals, agreed to pay \$15,000 to the Trustee. Ned Bord and the two others were also ordered and directed to obtain from the National Bank of Washington a release of the bank's claim in the amount of \$33,000 which had been filed in the same bankruptcy proceedings, and Ned Bord withdrew his claim against the bankrupt for \$99,520.95.

In addition to the deficiency in income tax which had been assessed against the petitioners for the calendar year 1958, respondent also assessed against them a negligence penalty for failing to report the liquidation of Sedgwick Gardens, Inc., and failing to report the income received from this liquidation (J.A. 3).

On November 15, 1963, the Tax Court, although sustaining the major part of the assessments, held that a deficiency in income tax for the calendar year 1958, in the amount of \$18.16, plus a penalty and interest totating \$5.29, were erroneously assessed against, and collected from, petitioners and directed a refund of those amounts, plus interest to the date of payment of the refund.

Petitioners moved the Tax Court for a reconsideration of its decision, for further hearing, to revise findings of fact and to vacate the decision (J.A. 2, 48), all of which were denied (J.A. 2, 51-53). A petition for review by this Court was filed by petitioners on January 30, 1964 (J.A. 54).

SUMMARY OF ARGUMENT

Petitioners contention that the deficiencies in income tax assessed against them were invalid because they were assessed after the expiration of the time in which they could have legally been made is incorrect.

Pursuant to a consent agreement entered into between the petitioners and the Finance Office, the time for assessment against the petitioners of income taxes for the calendar year 1958, was extended to and including October 15, 1962. The consent further provided that if, prior to that time, a notice of deficiency was sent to the taxpayers, the time for making any assessment "shall be extended beyond the said time [October 15, 1962] by the number of days during which the Finance Office, D.C., is prohibited from making an assessment and for 60 days thereafter." In conformity

with the agreement, a notice of deficiency was mailed to the petitioners on September 12, 1962, well before the October 15 deadline. The notice of deficiency set forth the amount of petitioners' tax which, under the Income and Franchise Tax Act of 1947, the Finance Office had determined exceeded the amount shown as a tax by the taxpayers on their return. On November 21, 1962, the Finance Office, pursuant to statutory requirements, mailed to the petitioners a statement in which the deficiency in taxes had been recomputed and enclosed a bill for the deficiency. Since the notice of deficiency was mailed prior to the October 15th deadline set forth in the consent agreement, and since, under the consent agreement, the assessment made on November 21, 1962, was within the time specified, the assessment was valid.

Prior to the dissolution of Sedgwick Gardens, Inc., that corporation sold its real property and executed a deed conveying it to the purchaser. Therefore, the gain which Sedgwick Gardens, Inc. realized from the sale was part of its earned surplus which, when distributed upon liquidation, was, to the extent received by petitioners, a taxable dividend to them. The Tax Court's conclusion that the corporation sold its own real property was based upon adequate findings of fact.

Petitioner Ned Bord advanced substantial sums to the Sun Corporation in which he was a stockholder, an officer, and a director. Despite these advances, the Sun Corporation was, in 1959, adjudicated a bankrupt. Bord filed with the Bankruptcy Court a claim which included

the sums he had advanced to Sun. The amounts claimed by Bord to have been loans to the Sun Corporation were correctly found by the Tax Court to be capital contributions and not loans and, for this reason, not deductible from gross income as bad debts. Even assuming, arguendo, that these advances were in the nature of loans to the Sun Corporation, they could only be deducted from gross income on petitioners' 1958 income tax return if the loans were ascertained during that year to be worthless. There was no proof that these alleged loans, or any part of them, had been determined during 1958 as worthless. In any event, in the bankruptcy proceeding involving the Sun Corporation, Mr. Bord, in compromise of the Trustee's claims against him, withdrew all of his claims against Sun, agreed to make certain cash payments to the Trustee, and to aid in effecting the release of another claimant's claim against the bankrupt Sun Corporation. Thus, Mr. Bord did not suffer any loss which he could claim as a bad debt; in fact, he received consideration for the withdrawal of his claims against Sun.

Petitioners were assessed a 5 per cent negligence penalty for failing to disclose on their tax return the sale of Sedgwick Gardens, Inc., or the income received by them from the dissolution of the corporation. Their defense was that they relied upon advice of their accountant. However, his testimony failed to show that they had in fact relied on his advice. The District's individual income tax return provides for the

reporting of nontaxable income. Petitioners did not report on their return either the sale of Sedgwick Gardens, Inc., or the income they received from the dissolution of the corporation as either taxable or nontaxable income. Since the income tax form clearly required petitioners to report, in one manner or another, the transaction involving Sedgwick Gardens, Inc., their failure to report was, at the very least, negligence.

ARGUMENT

I

The assessment was not barred by the Statute of Limitations.

Petitioners' claim that the taxes in question had not been assessed within the three year period required by § 47-1586i (a) (1), D.C. Code, 1961, and that they were therefore void. Respondent concedes that the deficiency in taxes was not assessed within the statutory three year period, but contends that the assessment was timely under § 47-1586i (c), D.C. Code, 1961, which provides:

"Waiver.—Where before the expiration of the time prescribed in subsection (a) for the assessment of the tax, both the Assessor and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

Pursuant to this section, a consent agreement was entered into on March 15, 1962, between petitioners and the Finance Office extending to and including October 15, 1962, the time for assessment against the petitioners

of income taxes for the calendar year 1958. The consent provided that any income tax due from the petitioners:

" * * * may be assessed at any time on or before October 15, 1962, except that, if a notice of deficiency in tax is sent to said taxpayer (or taxpayers) by registered or certified mail on or before said date, then the time for making an assessment as aforesaid shall be extended beyond the said date by the number of days during which the Finance Officer, D.C., is prohibited from making an assessment and for 60 days thereafter." (Emphasis supplied.)

A notice of deficiency in tax, as authorized by the above quoted consent, was mailed by certified mail to the petitioners on September 12, 1962 (J.A. 90) in conformity with § 47-1586d, D.C. Code, 1961, which provides:

"If a deficiency in tax is determined by the Assessor, the taxpayer shall be notified thereof and given a period of not less than thirty days, after such notice is sent by registered mail or by certified mail, in which to file a protest and show cause or reason why the deficiency should not be paid. Opportunity for hearing shall be granted by the Assessor, and a final decision thereon shall be made as quickly as practicable."

On November 21, 1962, the Finance Office mailed to petitioners a statement in which their deficiency in taxes was recomputed and a bill for taxes dated November 21, 1962, was included. Section 47-1551c (q) (1) defines a deficiency as follows:

"(1) the amount or amounts by which the tax imposed by this subchapter as determined by the Assessor exceeds the amount shown as the tax by the taxpayer upon his return."

The District's letter of September 12, 1962 notified the petitioners that certain adjustments in their tax liability as shown in the accompanying report were warranted, and the amount of petitioners' deficiency in tax was stated therein. Line number 8 of that report reads: "8. Deficiency in Tax. * * * \$9,815.10." Clearly, respondent's notice of September 12, 1962, and the enclosed report constituted a "notice of deficiency" as contemplated by the consent agreement dated March 15, 1962.

In their brief, petitioners say:

"It appears plain to us that in the case of a deficiency, the correct tax cannot be determined until opportunity for protest and final hearing have been granted, as the single 'final decision' of which the statute speaks is to be made following the granting of such opportunity. The letter of September 12, 1962, was a mere proposal of an adjustment. Whether the 'adjustment' — the exact word used in the letter — would result in a deficiency would depend not only on the taxpayers' response, the contents of their protest, if they filed one, but also on the 'final decision' the Finance Officer is required to make. * * *" (Pet.'s Br. p. 14.)

In support of their argument that the September 12, 1962 letter was a "mere proposal of an adjustment," and not a "notice of deficiency," petitioners compare provisions of District law with provisions of the Internal Revenue Code, and argue from this comparison that a "deficiency" for District tax purposes under the Income and Franchise Tax Act of 1947 is the same as a "deficiency" for federal income tax purposes; i.e., a final administrative determination (Pet.'s Br. p. 15). The provisions of the Federal and District taxing lawing, although comparable in many respects, differ materially in the aspect to which petitioners' arguments are directed; a "deficiency" for District tax purposes is not the same as a "deficiency" for federal tax purposes.

Section 47-1551c(q) (1) defines for District tax purposes a "deficiency" as "the amount or amounts by which the tax imposed by this subchapter as determined by the assessor exceeds the amount shown as the tax by the taxpayer from his return" and is substantially identical with § 6211 of the Internal Revenue Code of 1954. The provision for notice of a deficiency¹ to which reference is made in § 6212 of the Internal Revenue Code carries with it a finality that is not present in the case of deficiencies determined by the assessor in connection with income or franchise taxes. Section 6213 of that Code, after providing for the filing of a petition in the Tax Court of the United States by a taxpayer receiving a "notice of deficiency," says, in pertinent part:

"(c) Failure to File Petition. — If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary or his delegate."

Thus, under federal law a notice of deficiency is a "final determination" but, under District law, a "notice of deficiency" which is simply a determination by the assessor that the taxpayer owes more tax than is shown upon his return, is but one step in the process of the making of a "final determination." According to § 47-1586d of the D.C. Code, the taxpayer, when a notice of deficiency is received by him, may

1. the form or content of the notice is not defined either for purposes of District or federal law.

protest and show cause or reason why the deficiency should not be paid; the taxpayer is entitled to hearing, if he requests one, and the assessor is thereafter required to make a final decision thereon as quickly as practicable.

Petitioners say at page 14 of their brief:

" * * * Significantly, the letter of November 21, 1962, speaks of a 'proposed deficiency.' Since that letter enclosed the final bill, it must have been the 'notice of deficiency' referred to in the original agreement. * * *"

Here again, the argument does not follow the provisions and requirements of the District taxing statute which, in § 47-1586d says that:

"If a deficiency in tax is determined by the Assessor, the taxpayer shall be notified thereof * * *."

If the November 21, 1962 letter was, as petitioner claim, a "notice of deficiency" then it would follow that petitioners were entitled to protest once more the "notice of deficiency," and "show cause or reason why the deficiency should not be paid." But, as petitioners themselves state, the November 21, 1962 letter "enclosed the final bill," which means, simply as the Tax Court held, that the September 12, 1962 letter was a "notice of deficiency" which culminated in the final decision required by § 47-1586d. Finally, petitioners comment upon the use of language in the September 12 letter stating that an "adjustment" is "warranted." The entire letter follows completely the statutory scheme for determining deficiencies in tax. The opening paragraph states:

"The examination by this office of your Individual Income Tax Return(s) for the year(s) ended September 31, 1958, indicates that the adjustment of your tax liability, as shown in the accompanying report(s) of your District of Columbia Individual Income Tax Audit 'Changes,' is 'Warranted.' " (J.A. 90.)

That statement clearly indicates that the assessor had examined petitioners' returns and had determined that the amount shown thereon was less than the amount of the tax imposed under the Act. The determination was by no means final and could not be under the Act. The letter continues by notifying petitioners, as the statute requires, of their right to file a protest within 30 days, their right to a consideration of their protest and their right to a hearing in the Finance Office which "will be granted to you prior to final determination." That "final determination" was set forth in the November 21 letter. It is clear that petitioners construed the letter as a "notice of deficiency" and acted upon it as such.

The Tax Court correctly stated in its opinion on this matter:

"On September 12, 1962, there was sent by certified mail to the petitioners by the Finance Office a notice of deficiency as provided in § 47-1586d of the District of Columbia Code, to which was attached an Auditor's report, wherein the deficiency incometax was computed to be \$10,305.86, plus a negligence penalty of \$490.76. ****" (J.A. 24.)

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" * * * A deficiency notice was mailed before October 15, 1962, and the deficiency was assessed on November 21, 1962. Both steps were well within the agreed periods. The Court is of the opinion that the deficiency was validly assessed. * * *" (J.A. 25.)

II

The proceeds of the sale of Sedgwick Gardens was a dividend when received by the petitioners.

The Tax Court correctly concluded that petitioners realized a taxable dividend from the sale of the Sedgwick Gardens Apartments. Sedgwick Gardens, Inc., was a Maryland corporation having as its principal asset an apartment house located at 3726 Connecticut Avenue, N.W., Washington, D.C. One of its stockholders was petitioner Anne R. Bord. The apartment house was managed by the Real Estate firm of Randall H. Hagner & Co. and petitioner Ned Bord, an employee of the Hagner firm and, the husband of stockholder Anne R. Bord. At a special meeting of the Board of Directors of Sedgwick Gardens, Inc., on January 10, 1958, the corporation was authorized to liquidate its assets and dissolve. At the same time, written consent of the stockholders was obtained authorizing the dissolution of the corporation.

On January 17, 1958, a proposed sales contract, containing an offer by Darwin Corporation to purchase the Sedgwick Gardens Apartments was submitted to the stockholders. The liquidating stockholders made a counter offer on January 27, 1958, and, on the same day, Darwin Corporation accepted this offer. Settlement was made on February 28, 1958, and the deed conveying the real property to the purchaser was executed by Sedgwick Gardens, Inc., the owner of record, as sole grantor, and not by the liquidating stockholders.

Sedgwick Gardens, Inc., not the stockholders, ordered from a title company examination of the title to Sedgwick Gardens Apartments. In accordance with the written instructions it had received from the corporation, signed by its Vice-President, Ned Bord, the title company paid one fourth of the net proceeds of the sale or \$203,373.78 to each of the stockholders.

Sedgwick Gardens, Inc., filed a final District franchise tax return for the period January 1 through February 28, 1958 (J.A. 83), which, on its face, shows rental income, as well as other miscellaneous income, still being received by the corporation. Moreover, the corporation's president, vice-president, secretary, and treasurer continued to receive for the same period compensation for their services to the corporation. Schedule F thereof, entitled "COMPENSATION OF OFFICERS," shows that each officer received, for the period January 1 through February 28, 1958, the sum of \$1,000. From these facts alone, it is very apparent that Sedgwick Gardens, Inc. was a going corporation during this period and that it, and not the stockholders, was in full control of the assets of the corporation.

Articles of Dissolution for Sedgwick Gardens, Inc., were not approved by the State of Maryland until March 4, 1958, a date subsequent to the conveyance by Sedgwick Gardens, Inc., of its real property to the purchaser.

The determination of whether the disposition of the real property of Sedgwick Gardens, Inc., was an act of the corporation or of the individual stockholders rests upon the facts of the transaction. In United States v. Cumberland Public Service Co. 338 U.S. 451, 456, 70 S.Ct. 280, 94 L.Ed. 25, the Supreme Court said:

" * * * It is for the trial court, upon consideration of an entire transaction to determine the factual category in which a particular transaction belongs. Here as in the Court Holding Co. case we accept the ultimate findings of fact of the trial tribunal."

See also Commissioner v. Court Holding Co. 324 U.S. 331, 65 S.Ct. 701, 89 L.Ed. 981. The incidence of taxation depends on the substance of a transaction regardless of formalisms. Taxes on a corporate sale may not be avoided by using the stockholders as a conduit through which an attempt is made to pass title. Here, on the basis of adequate findings of fact, the Tax Court found that the sale in question was made by the corporation rather than by the stockholders (J.A. 6).

Section 47-1557(a), D.C. Code, 1961, includes "dividends" within the definition of gross income. Section 47-1551c(m), D.C. Code, 1961, defines a dividend as:

"* * * any distribution made by a corporation (domestic or foreign) to its stockholders or members, out of its earnings, profits, or surplus (other than paid-in surplus), whenever earned by the corporation and whether made in cash or any other property (other than stock of the same class in the corporation if the recipient of such stock dividend has neither received nor exercised an option to receive such dividend in cash or in property other than stock instead of stock) and whether distributed prior to, during, upon, or after liquidation or dissolution of the corporation: * * *"

In the District of Columbia, amounts distributed by a corporation to stockholders in complete liquidation of the corporation, less an amount equal to the capital investment, are treated as dividends under Section 47-1551c(m), D. C. Code 1961. Berliner v. District of Columbia, 103 U.S. App. D. C. 351, 353, 258 F. 2d 651, cert. denied. 357 U.S. 937. In District of Columbia v. Oppenheimer, 112 U.S. App. D. C. 39, 301 F. 2d 563, the Court found that the amounts includible in gross income as dividends to the stockholders were the amounts which represented the "earnings, profits, or surplus," of the corporation and distributed to the stockholders. In the present case the profit realized by Sedgwick Gardens, Inc., from the sale of its real property was "earned surplus." Petitioners attempt to avoid this result by contending that it was really the liquidating stockholders, and not the corporation, who sold the property known as 3726 Connecticut Avenue. The factual situation involved in the dissolution of Sedgwick Gardens, Inc., brings this case squarely within the holding in Berliner. In examining the decision of the Tax Court, this Court in Berliner stated:

"* * *The distribution made by Erco, during or upon its liquidation, was thus out of 'its earnings, profits, or surplus,' earned in part from operations and in part on the sale of its assets in 1954. As such, it falls precisely within the statutory language and the imposition of the tax was required."

As in Berliner, the distribution here falls squarely within the statutory language and the imposition of tax is required.

III

The Finance Office properly disallowed a deduction
for bad debts representing loans made by Petitioner
Ned Bord to the Sun Corporation.

When a stockholder loses funds which he made available to a corporation, he may incur a bad debt or a capital loss, depending upon whether the amount is to be considered a capital contribution or a loan. The factual question as to the nature of the transaction must be decided from evidence showing the true intent of the parties.. To sum up, the whole matter is essentially a question of fact to be decided by the trial court. See Matthiessen v. Commissioner, 194 F. 2d 659.

Petitioner Ned Bord was an officer, as well as a stockholder and director of Sun Corporation. During that time, due to the poor financial position of Sun, he made available to the corporation substantial sums of money to keep the business going. Despite these supplementations, Sun was, in the early part of 1959, adjudicated a bankrupt. Thereafter, Mr. Bord filed with the Bankruptcy Court claims against the corporation totalling \$99,520.95, which amount included the alleged loans that he had made to Sun aggregating \$86,708.99. The assessing authorities of the District disallowed, in its entirety, Bord's claimed deduction for income tax

purposes of the alleged loans made by him to Sun Corporation. The Tax Court, in sustaining the disallowance, stated:

"* * * Even if it could be said that the advancements made by Ned Bord to the corporation were loans and not capital investments, which is by no means certain, (CF: Eugene H. Retzke, 40 T.C. 443; George P. Weddle, 39 T.C., 493) whatever claim he might have had was offset by the claim which the corporation had because of the diversion of funds by him. Moreover, his claim was settled for a valid consideration. The weakness of his claim and the validity of the claim by the Trustee in Bankruptcy can be gauged by the fact that he not only relinquished his claim, but paid \$5,000 to the Trustee in Bankruptcy, and effected the settlement or withdrawal of the claim of the National Bank of Washington for \$33,000, which, it is assumed, was not accomplished for nothing." (J.A. 40-41.)

In addition to the reason stated above, the Tax Court found that the "advances" made by Bord to the Sun Corporation were "capital contributions," or as the Tax Court stated:

"* * * No evidence of reasons for the advance nor of any of the circumstances of the advancement, nor any fact, other than the bare statement that the advances were made, and his concession or admission that he was not in the money lending business, was submitted. * * *"

The only evidence of the loans that Bord allegedly made to the Sun Corporation was Bord's own testimony to that effect. The facts and circumstances surrounding these "loans" were, as the Tax Court pointed out, "peculiarly in the knowledge of Ned Bord." (J.A. 41.) It was incumbent upon Bord to prove that these loans were not in reality capital contributions to the failing Sun Corporation. This he did not do.

It is well settled that the trial court is best suited to observe the demeanor of a witness who is testifying and to decide the value of the testimony being adduced. Here, the trial court concluded that the so-called "loans" were in fact "capital contributions." It is also well settled that an appellate court will not, in the absence of an abuse of discretion by the trial court, upset its finding, and certainly no such abuse of discretion is here present.

Even assuming, arguendo, that Bord did in fact lend money to the Sun Corporation, these loans were not deductible by him in 1958, the year in which he claimed the loss on his income tax return. Section 47-1557(b) (5) provides for a deduction from gross income as follows:

"(5) Bad Debts. — Debts ascertained to be worthless and charged off within the taxable year or, in the discretion of the Assessor, a reasonable addition to a reserve for bad debts. When satisfied that a debt is recoverable only in part, the Assessor may allow such debt, in an amount not in excess of the part charged off within the taxable year, as a deduction. * * *" (Emphasis supplied.)

Bord's bad debts could only have been charged off during the tax year 1958 if they had been ascertained during that year to be worthless.

Sun Corporation was adjudicated bankrupt on March 17, 1959, and Bord had filed a claim with the Bankruptcy Court. It was not until December 21, 1960 that the Referee in Bankruptcy signed an order authorizing a compromise of the Bord claims. Therefore, the debts, if they

were debts, were certainly not ascertainable as worthless until that date and could not be charged off during 1958.

Again assuming, arguendo, that the alleged loans to Sun were ascertainable as worthless in 1958, they could not be classified as bad debts. In reality, the alleged debts claimed as losses were not, in fact, losses, as the following will demonstrate.

On December 21, 1961, the Referee in bankruptcy, upon petition of the Trustee in bankruptcy of Sun Corporation, signed an order which authorized a compromise between Bord and the Trustee on involved terms. Inter alia, Bord and two others agreed to pay to the Trustee \$15,000; and Bord agreed to obtain the release of a claim in the amount of \$33,000.00 filed against the bankrupt's estate by the National Bank of Washington. Paragraphs 3, 4 and 5 of the "Petition for Authority To Compromise Controversy" reads as follows:

"3. That your petitioner is informed and believes that NATHAN M. BROWN his counsel in this case, investigated into the books and records and affairs of the corporation, following which he entered into the negotiations for the purpose of attempting to compromise the claim of your trustee against the officers and directors of the corporation for recovery of the preferential payments, and to recover damages for wrongful diversion of funds of the corporation. (Emphasis supplied.)

4. That as a result of the negotiations between your petitioner's attorney and the attorney representing the three principal officers and directors, namely: SAM GILDER, NED BORD, and OSCAR FELKER, your petitioner has

received, through his counsel, an offer to settle any and all claims of the trustee against the above-named individuals for the following consideration.

(a) Mr. Ned Bord will withdraw and release his claim in this bankruptcy proceeding as filed in the amount of \$99,520.95.

(b) Mr. Sam Gilder will release his claim in this bankruptcy proceeding as filed in the sum of \$34,521.00.

(c) The aforesaid officers and directors will cause the National Bank of Washington to withdraw and release its claim as filed in this proceeding in the sum of \$33,000.00.

5. In addition, Messrs. Bord, Gilder and Felker will pay to your trustee a total sum of \$15,000.00 in cash, payable in the following instalments:

\$5,000.00 on January 2, 1961
\$4,000.00 on February 1, 1961
\$3,000.00 on March 1, 1961
\$3,000.00 on March 31, 1961." (J.A. 100)

Since Bord relinquished his claims against Sun and, together with two other individuals, agreed to pay \$15,000.00 to the Trustee, and further agreed to assist in procuring a release of a claim of the National Bank of Washington as a compromise of the controversy with the Trustee in Bankruptcy, he did not suffer any loss. In fact, he received consideration for the compromise. The consideration so received took the place of and compensated him for any claimed loss of his "loans."

IV

Petitioners' motion for further hearing was properly
denied by the Tax Court.

Subsequent to the entry of the Tax Court decision, petitioners moved that court for a further hearing. Their motion was bottomed principally on the proposition that the Tax Court had decided the bad debt question incorrectly since it erroneously proceeded on the theory that Ned Bord's loans to the Sun Corporation were not in fact loans but capital contributions to that corporation. An additional reason assigned was an alleged need for additional evidence as to the nature of Mr. Bord's payments to Sun Corporation which petitioners were said to be then prepared to offer.

Petitioners had the burden of proving that the taxes assessed against them, including taxes assessed as a result of the disallowance of the claimed bad debts, were invalid. It was not the duty of the Tax Court to attempt to elicit proof as to the nature of the loans made by Bord any more than it was the duty of the respondent to do so. Petitioners' failure of proof, as it relates to the bad debt issue, prevented them from overcoming the presumption of validity which had attached to the District's assessments.

As petitioners correctly point out in their brief (Petitioners' brief, p. 27), the ruling on a motion for further hearing or rehearing rests within the sound discretion of the trial court. The tax Court

properly exercised its "sound discretion" in denying petitioners' motion for a further hearing. See: Traum v. Commissioner of Internal Revenue, 237 F. 2d 277.

V

The 5 per cent negligence penalty assessed against petitioners was warranted and proper.

A further question raised by petitioners is the validity of the assessment by the District of a 5 per cent negligence penalty imposed by reason of their failure to disclose on their return² the sale by Sedgwick Gardens, Inc., of 3726 Connecticut Avenue, N. W., or the income received by them from the dissolution of the corporation. Petitioners' defense to the imposition of the negligence penalty is that they had relied on their accountant, who prepared their 1958 joint individual income tax return.

Section 47-1589b provides for a negligence penalty and reads as follows:

"Additions to the Tax in the Case of Deficiency. --
(A) Negligence. -- If any part of any deficiency is due to negligence, or intentional disregard of rules and regulations but without intent to defraud, 5 per centum of the total amount of the deficiency (in

² Counsel for both parties have stipulated that, although the reproduced copy of petitioners' return (commencing at page 105 of the Joint Appendix) does not show signatures, the original thereof filed with the District was signed by both petitioners and by Oliver W. Higgs, for Sinrod and Tash, Certified Public Accountants and Counsel for Petitioners.

addition to such deficiency) shall be assessed, collected, and paid in the same manner as if it were a deficiency."

In Journal Company v. Commissioner of Internal Revenue, 46 B.T.A. 841, 845, a 5 per cent penalty for intentional disregard of the Commissioner's rules and regulations was upheld. Therein the taxpayer had sought the advice of counsel as to what it should do under existing circumstances, and advice so received was followed. It proved to be erroneous. The Court, in sustaining the penalty, said:

"The defense advanced is in the nature of confession and avoidance. Petitioner stipulates that it acted with knowledge but upon advice of counsel and directs attention to the division of opinion on this Board in Spokane Dry Goods Co., supra, as proof of the soundness of its action and as justification for its belief that the respondent's regulation was invalid. Be that as it may, the statute speaks in mandatory language when it states that if 'any part of any deficiency is due to * * * intentional disregard of rules and regulations but without intent to defraud, 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected, and paid in the same manner as if it were a deficiency' * * *."

As above noted, petitioners' defense in the pending case is that they relied on the advice of their accountant. Oliver W. Higgs, their personal accountant, who was also accountant for Sedgwick Gardens, Inc., testified on direct examination as follows:

* * * * *

"BY MR. STRUPP:

Q. Now, did you give Mr. Bord any advice relative to the reporting of this transaction?

A. Well, that particular transaction was not reported on this return, frankly, because we felt that there was no profit on it and not being any profit, there was not any need to report it.

Q. Why did you think so?

A. Well, we feel that the base in the hands of Mrs. Bord was equal to the selling price.

Q. What do you mean by base in this case?

A. Well, her -- the cost to her or the tax base in her 25 percent interest in the property which had been liquidated to her. We felt that this base was equivalent to the selling price, the sale having occurred almost simultaneously with the liquidation.

Q. Did you advise Mr. or Mrs. Bord of this?

THE COURT: That simply is a leading question. I would ask him whether he did.

BY MR. STRUPP:

Q. Did you do anything relative to this?

A. Well, we did not put it on the return. Frankly, we didn't feel there was a taxable transaction.

THE COURT: He wants to know what did you do to Mr. Bord with respect to Mr. Bord?

BY MR. STRUPP:

Q. You are speaking about communications, now, between yourself and the taxpayer, if any?

A. To be perfectly frank with you. I don't recall any. However, it is very possible that I may have pointed out to Mr. Bord that it was not on his return and the reason for it.

THE COURT: We are not concerned with possibilities. We like the facts.

BY MR. STRUPP:

Q. However, you prepared this return?

A. That is correct." (Emphasis supplied.)
(J. A. 76)

The most that can be said for Mr. Higgs' testimony is that he could not recall discussing with either of the petitioners the transaction involving the liquidation of Sedgwick Gardens, Inc. Thus, there is no direct evidence that petitioners relied upon Mr. Higgs' advice. Section 47-1564 provides that the Assessor shall prescribe forms for returns and that returns shall be filed on such forms. It further provides that the taxpayer shall have the obligation to obtain and file a return "without being called upon to do so."

The petitioners filed a return on the prescribed form but made no mention thereon of the liquidation of Sedgwick Gardens, Inc., or of the income they received from it. Section 47-1564a provides, in pertinent part:

"Each * * * return * * * [shall state] * * * specifically the items of his gross income and the items claimed as deductions and credits allowed under this subchapter, and such other information for the purpose of carrying out the provisions of this subchapter as the Assessor may require: * * *."

The District of Columbia individual income tax return form for 1958 specifically provides on page 2 thereof for reporting of nontaxable income (J. A. 105-114). Petitioners could have avoided any possible question of an assessment of a negligence penalty by stating on their return the facts involved in the liquidation of Sedgwick Gardens, Inc. Instead of following this simple and forthright course, they chose to make no mention either of the liquidation or of the income they received from it. Their failure to report the transaction was, at the least, negligence.

CONCLUSION

For the foregoing reasons the decision of the District of Columbia Tax Court applicable to Petitioners Ned and Anne R. Bord should be affirmed.

CHESTER H. GRAY,
Corporation Counsel, D. C.

MILTON D. KORMAN,
Principal Assistant
Corporation Counsel, D. C.

HENRY E. WIXON,
Assistant Corporation
Counsel, D. C.

ROBERT E. McCALLY,
Assistant Corporation
Counsel, D. C.
Attorneys for Respondent,
District Building,
Washington, D. C.
20004

PETITION FOR MODIFICATION OF JUDGMENT

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 16 1965

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nathan J. Paulson
CLERK

No. 18,476

NED BORD AND ANNE R. BORD,

Petitioners

v.

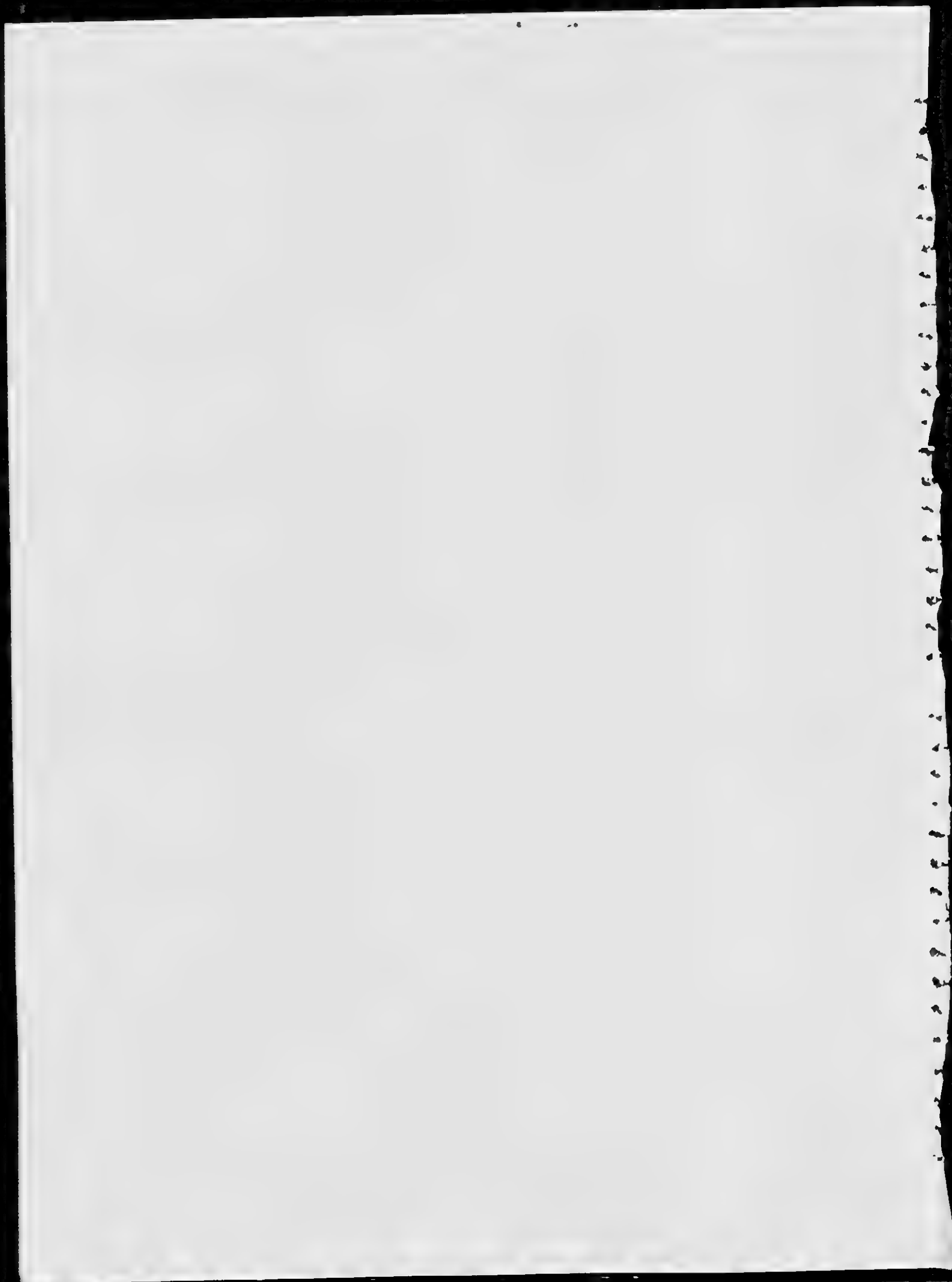
DISTRICT OF COLUMBIA,

Respondent

ON PETITION FOR REVIEW OF A DECISION OF
THE DISTRICT OF COLUMBIA TAX COURT

NATHAN SINROD

WERNER STRUPP
Attorneys for Respondent
1705 DeSales Street, N. W.
Washington, D. C. 20036



IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NED BORD AND ANNE R. BORD,

Petitioners

v.

DISTRICT OF COLUMBIA,

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No. 18,476

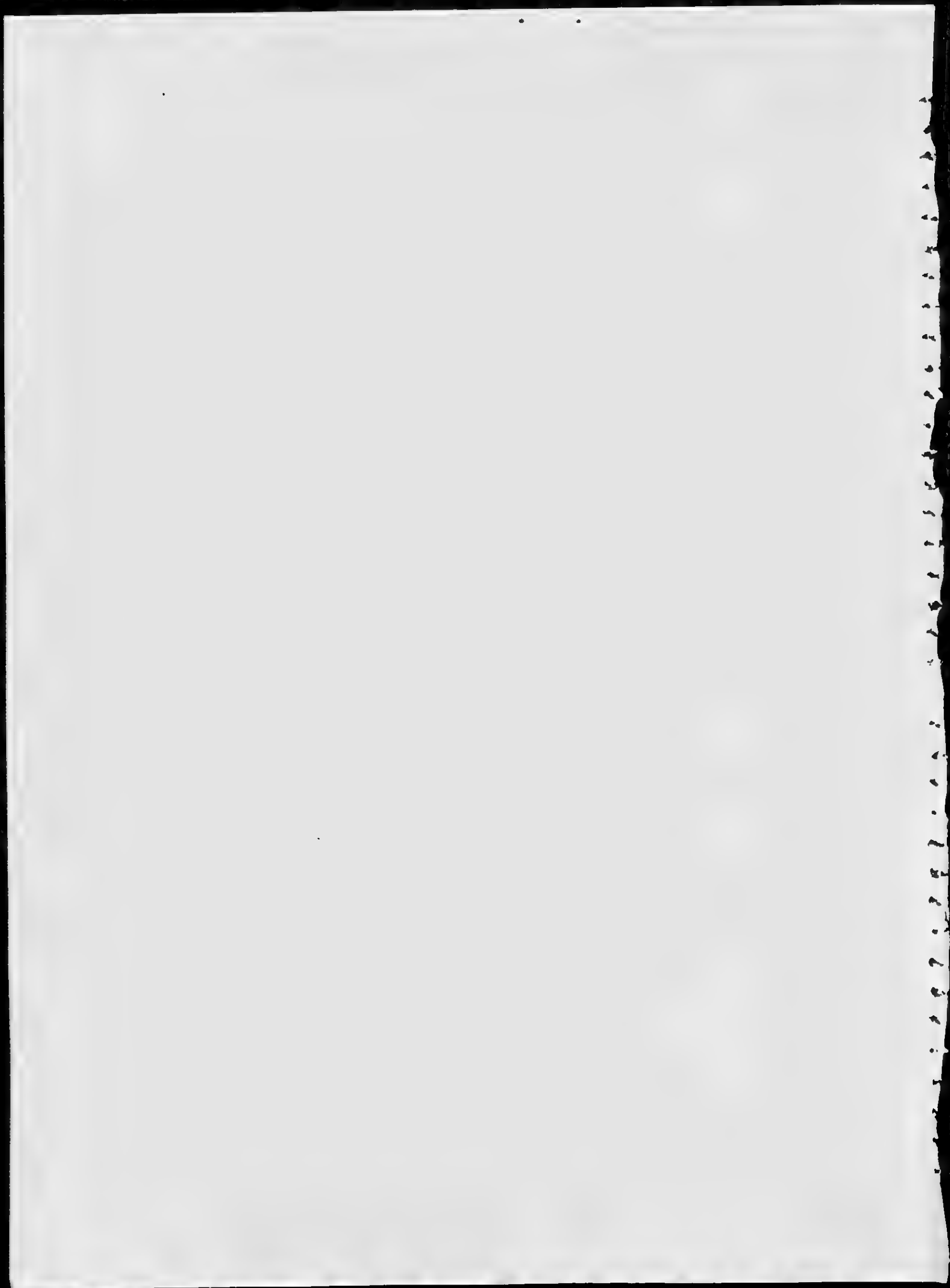
PETITION FOR MODIFICATION OF JUDGMENT

Pursuant to the provisions of Rule 26, the petitioners in the above-entitled case petition the Court to modify its judgment, filed herein in accordance with the Court's opinion dated March 4, 1965.

This petition is directed to only one issue decided by the Court. This concerns the ruling that affirmed the Tax Court in its determination that the petitioners are not entitled to a deduction by reason of advances made to Sun Corp.

This Court in essence agreed with the Tax Court that petitioners had not met their burden of proof in respect to the claimed bad debt deduction. This Court also apparently agreed with the petitioners in their contention that the settlement agreement entered into in the bankruptcy proceeding in 1960, could have no bearing on the question before the Tax Court. In Footnote 8, page 6 of the slip opinion, this Court said:

"The Tax Court held, correctly in our opinion, that, in view of the other consideration given by Bord and the unliquidated nature of the Trustee's claim, no inference as to the merit of Bord's claim for repayment of the prior advance could be drawn from the settlement agreement."



This view accords with the Tax Court's expression at the trial (page 27 of petitioners' brief, J. A. 74), although it is somewhat at variance with the opinion of the Court below. For, in the Tax Court's opinion (J. A. 41), the statement is made that Bord's claim "was settled for a valid consideration". Yet, at the conclusion of this section of the opinion, the Tax Court states:

"The only finding that can be made is that the advances were capital contributions, or at least, no finding that they were loans can be supported." (Emphasis added).

While the Tax Court did not find as a fact either that capital contributions were made or that the funds advanced were not loans, it did conclude that the petitioners had not proved the deductibility of a bad debt. With this conclusion, this Court has agreed. However, we respectfully submit that this does not dispose of the entire case. As was pointed out in our brief, a capital contribution may result in a deductible loss. Section 47-1557b(a)(4), D. C. Code (1961), allows a deduction for losses that may be incurred either in trade or business or not in trade or business, subject to the requirement that the transaction is not a "capital loss". (This portion of the statute appears in full on pages 5 and 6 of our brief.) Under Section 47-1551c(1) of the Code, a "capital loss" involves disposition of an asset held for more than two years.

It is clear, of course, that the findings necessary to reach the foregoing determinations must in the first instance be made by the Tax

Court. It was for this reason primarily that the petitioners moved the Tax Court for a further hearing in this case. It has been recognized that a taxpayer may appropriately rely on alternative grounds to sustain the deduction of a loss of this kind. Lidgerwood Manufacturing Co., 22 T. C. 1152, 1156. In Kugel v. Ryan (2nd Cir. 1961), 289 F.2d 329 -- a case involving an appeal from summary judgment in favor of the Government, the Court while agreeing that the taxpayer was not entitled to a bad debt deduction, said the following:

"We hold that the taxpayers are entitled to an opportunity to prove, if they can, that their claim against Sparks reasonably appeared uncollectible in the light of the facts existing in 1946 and thus to bring themselves within the ambit of the White Dental case, supra. (This last reference is to United States v. White Dental Mfg. Co., 274 U. S. 398, also mentioned in our brief.)*


To be sure, in the instant case, the offer of proof on the capital contribution issue was not made until the Tax Court had decided the case. But, it should be recognized that this issue was not raised theretofore at any time by either party. The record reveals no suggestion that the length of the taxpayers' holding period would ever become a problem for determination. In view of these facts, we submit, in the interest of justice, the petitioners should now have the opportunity to prove these vital facts.


For the reasons herein stated, it is submitted that this Court

* The Court of Appeals refers to the possibility of deductibility under Section 23(e) of the 1939 Internal Revenue Code -- a provision substantially similar to Section 47-1557b(a)(4), cited above.

should so modify its judgment that upon remand of this case, already ordered on other grounds, the Tax Court be directed to make additional findings of fact and conclusions of law in respect to the question of whether petitioner Ned Bord contributed capital to Sun Corp. and whether such contribution resulted in a loss in 1958.

Respectfully submitted


Nathan Sinrod


Werner Strupp
Attorneys for Petitioners

CERTIFICATE OF COUNSEL

I, Werner Strupp, attorney for petitioners in the above-entitled case, hereby certify that the foregoing petition is presented in good faith and not for delay.

Werner Strupp
Werner Strupp

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket No. 18,476

NED BORD AND ANNE R. BORD,

Petitioners,

v.

United States Court of Appeals
for the District of Columbia Circuit

DISTRICT OF COLUMBIA,

Respondent.

FILED MAR 26 1965

Nathan J. Paulson
CLERK

OPPOSITION OF DISTRICT OF COLUMBIA TO PETITION
FOR MODIFICATION OF JUDGMENT

Petitioners petition the Court to modify its judgment of affirmance of March 4, 1965, by directing the Tax Court, on remand already ordered on other grounds, to make additional findings of fact and conclusions of law in respect to the questions whether petitioner Ned Bord's advances to the Sun Corporation constituted capital contributions or loans, and whether such advances resulted in a bad debt loss during the calendar year 1958.

In the proceeding below, the Tax Court held that the evidence produced before it on the bad debt issue was insufficient to show that Sun Corporation ever became obligated to repay the advances made to it by petitioner Ned Bord. Petitioners had the burden of proving before the Tax Court that the taxes assessed against them, including those assessed as a result of the District's disallowance of petitioners' claimed bad debt, were invalid. The whole question was one of fact to be decided by the Tax Court on the evidence presented to it, evidence peculiarly in the knowledge of petitioner Ned Bord. It was not the duty of the Tax Court to attempt to elicit proof as to the nature of the advances made by Bord, any more than it was the duty of the District to do so. All of the information and circumstances involving the advances to Sun Corporation were well known to Bord since they were personal transactions conducted only by him. The Tax Court found that petitioners had not proved their claimed deduction for losses due to bad debts, and this Court affirmed the Tax Court on this point.

In addition, the Tax Court, in sustaining the disallowance, stated:

" * * * Even if it could be said that the advancements made by Ned Bord to the Corporation were loans and not capital investments, which is by no means certain, (CF: Eugene H. Retzke, 40 T.C. 443, George P. Weddle, 39 T.C., 493) whatever claim he might have had was offset by the claim which the corporation had because of the diversion

of funds by him. Moreover, his claim was settled for a valid consideration. The weakness of his claim and the validity of the claim by the Trustee in Bankruptcy can be gauged by the fact that he not only relinquished his claim, but paid \$5,000 to the Trustee in Bankruptcy, and effected the settlement or withdrawal of the claim of the National Bank of Washington for \$33,000, which, it is assumed, was not accomplished for nothing." (J. A. 40-41.)

Moreover, the Tax Court found that the advances made by Bord to Sun Corporation were capital contributions.

Petitioners, at page 2 of their petition, quote a portion of the Tax Court's opinion reading as follows:

"The only finding that can be made is that the advances were capital contributions, or at least, no finding that they were loans can be supported."

Based on this statement, petitioners have erroneously concluded that " * * * this does not dispose of the entire case. As was pointed out in our brief, a capital contribution may result in a deductible loss." (Pet. for Modification, p. 2.)

Petitioners overlook the fact that the above-quoted statement of the Tax Court was supplemental to its finding that petitioner Bord had not sustained the burden of proving his claimed loss for bad debts. Thus, it is immaterial whether his advances were loans or capital contributions.

Petitioner Ned Bord was an officer, as well as a stockholder and

director of Sun Corporation. The facts and circumstances surrounding the advances made by him were, as the Tax Court pointed out, "peculiarly in the knowledge of Ned Bord". (J.A. 41.) It was incumbent upon Bord to prove the true nature of the advances to Sun Corporation and all the facts surrounding these advances. This he failed to do. Thus, the effect of this petition is to request this Court to remand the case to the Tax Court for a new trial on the bad debt issue. But it is not claimed that petitioners have any new evidence relating to the bad debts. Every opportunity was afforded petitioners at trial to present all the facts surrounding the advances made by Mr. Bord to Sun Corporation.

Subsequent to rendition of the decision of the Tax Court, petitioners moved that court for a further hearing on the bad debt issue. The motion was denied. On appeal to this Court, petitioners, among other grounds, urged reversal upon the ground that their motion for further hearing was improperly denied. On appeal, this point was briefed and argued, both by petitioners and by respondent. This Court affirmed the Tax Court's decision that petitioner had failed to carry the burden of substantiating their claimed deduction for bad debts.

It is respectfully submitted that the bad debt issue was fully presented to the Tax Court and to this Court; that petitioners' motion for rehearing was properly denied by the Tax Court, and that petitioners' petition

for modification of the judgment of this Court of March 4, 1965, should be denied.

CHESTER H. GRAY
Corporation Counsel, D. C.

MILTON D. KORMAN
Principal Assistant Corporation
Counsel, D. C.

HENRY E. WIXON
Assistant Corporation Counsel, D. C.

ROBERT E. McCALLY
Assistant Corporation Counsel, D. C.

Attorneys for Respondent
District Building
Washington, D. C. 20004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition of District of Columbia to Petition for Modification of Judgment was mailed, postage prepaid, to Werner Strupp, Esq., 1705 DeSales Street, N.W., Washington, D. C., 20036, attorney for Petitioners, this 26th day of March, 1965.

ROBERT E. McCALLY
Assistant Corporation Counsel, D. C.